United States Court of Appeals

for the Second Circuit

APPENDIX

the check with the bank and a further meeting with Topper management, I believe.

A That is correct.

Q Did there occur a further meeting with Topper management subsequent to your check with Mr. Waldman?

A Yes.

Q When did that occur?

A It was on September 1st.

Q Who was present?

A Mr. Mole and me from the Pension Fund, Mr. Inglis from Hayden Stone, and then Messrs. Downs, Rose and Orenstein from Topper.

Q Can you tell us what occurred in the course of that meeting?

A Well, this was Mr. Mole's first meeting with the management of Topper and it provided him an opportunity to go over questions in areas that I had covered in my memoranda to him, and in this meeting we once again talked about the Dawn program and the success of it and the fact that they were going into a similar program at the end of 1971.

Q When you say, "We once again talked --"

A Mr. Orenstein and Mr. Downs told us about the success of the program, and we listened to what they had to say, and, in fact, Orenstein was even more enthusiastic than Hayden Stone's budget figures and the Rose sales figures in their August 18 letter, and he said he thought that Topper in 1971 would probably do three or four million in sales above the $68 million forecast.

In addition, we talked about the closeness of the relationship with Hayden Stone and the fact that they were on the board --

THE COURT: Hayden Stone is on the board?

THE WITNESS: Yes. By that I mean Berlind and Weill, ~~Wilg~~, who were two of the senior partners with ~~S. D. W. L.~~ CBWL - Hayden Stone -- and that they had their own money in it,

and the firm's profit sharing was in it. And in addition to that we once again went over this "Topper Corporation Examples of Company's Reporting" booklet, which we had in the room with us, and Rose told Mr. Mole many of the same things he told me before, specifically that sales were final, and it was brought out, I believe, ~~Orenstain~~ Orenstein and Rose at the meeting that the company no longer sold on consignment and that this practice had ended. And then they made reference to the reports that we had samples of here, and that, in fact, the Citibank was receiving ageings of receivables and data on collections as they were occurring.

I believe Mr. Mole also was aware from a reading of the Private Placement Memo that Mr. Downs had been with Manufacturers Hanover, even though his duties had changed at Topper, and he asked Mr. Downs about the relationship with Hanover insofar as Downs knew, and Downs told him it was not really his area, but he did not know of anything that was wrong and that it was a good relationship.

Q Anything else of importance that you can recall occurring at that meeting?

A I think that is about it.

Q Following that September 1 meeting, did Mr. Mole indicate to you that you should draft up a memorandum to the committee on

Finance concerning the proposed investment in Topper?

A Yes, he approved the writing, and I, in fact, did write a memo to the Committee on Finance.

Q You have before you a document marked in evidence as Plaintiffs' Exhibit 1370, which appears to be a copy to the Committee on Finance dated ~~December~~ September 2, 1971 re Topper Corporation. Is that the memorandum you prepared?

A Yes.

Q I call your attention to the first paragraph under the heading "Comment," particularly to the sentence:

"Over the past decade, Topper's dependence upon the Christmas season has been reduced markedly and this trend is expected to continue aided in part by the additional stability of the Sesame Street line, whose revenues are projected to increase from $7.0 million this year to $20.0 million in 1971."

"An increasing percentage of volume is in lower-priced, less seasonal items with approximately 60 percent of present sales coming from product categories which retail for under $2.00."

Does the last sentence I read refer to Dawn?

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A Dawn would be the bulk of that 60 percent, I believe.

Q This is the memorandum that went to the Committee on Finance on the basis of which they acted?

A That is correct.

Q Did you refer at all in this memorandum to your conversation with Mr. Waldman?

MR. WOLLEN: I think the memorandum speaks for itself. I object.

THE WITNESS: Well, there are two places --

THE COURT: He can say anything he wants, but I will read the memorandum.

MR. BICKS: Your Honor asked before, "Did you mention this? Did you mention that?"

THE COURT: I am allowing it.

A Well, on page 2 of this memorandum there is a reference to our retail trade and banking checks being favorable, and that would be certainly with reference to the First National City Bank's conversation. And at the top of that same page it says, "Management is noted by the retail trade and its banks for cost controls and production capabilities and does not commit large capital expenditures for tools and molds until order trends are clear," and that would, in part, refer to Citibank's

conversation and in part to the comments of Downs about Manufacturers Hanover. The primary information conveyed was the Citibank knowledge that the company was very good in estimating costs on new toys that they were going to put out.

Q Following this memorandum, did the Committee on Finance, in fact, approve participation by the Pension Fund in the proposed Private Placement?

A Yes.

Q Did the Pension Fund, in fact, participate in the Private Placement?

A Yes.

Q When did the Private Placement close, in fact?

A September 28, 1971.

Q Following September 28, 1971, did there come a time in December when you first heard of the difficulties of Topper?

A I believe we had an early indication in the first part of December that the year might be disappointing, but the first time we really had any background on this was on December 16, when Messrs. Downs and Rose and Orenstein, I believe, came in to brief Mr. Mole on a press release they were going to issue the next day.

Q When you say came, you mean came to the offices

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of the Pension Fund?

A Yes, they did.

Q What did Orenstein, Downs and Rose, I think you said, say?

A I believe all three of them were there.

Q What did they say on that occasion?

A I did not make a memorandum of that conversation because Mr. Mole was there, and a large part of the purposes of the memorandum was to convey information to him. But insofar as I remember, they made the point that it had been a very poor promotional year for toy companies and that they were experiencing returns. I believe they said that the trade had adopted what they called a clean-shelf inventory policy, whereby the preceding year they had inventories, and this year they had decided not to have anywhere near this level of inventories. In addition, I believe they said they had discontinued plans for a program similar to the Spring ~~1970~~ 1971 Dawn Program, in which they shipped out $14 million of goods.

And then in the conversation they told us that they expected to have a loss of ten to fifteen million dollars -- one of the reasons that I didn't write a memorandum --

THE COURT: You were paralyzed?

THE WITNESS: I was paralyzed. And they kept reciting, you know, the things that led up to this, and nothing from the verbal response would lead to a ten to fifteen million dollar loss in the company. So there was really nothing to put down on the paper at the end of the meeting, and I was shocked and stunned by it. There were virtually no numbers presented at this meeting, and Mr. Mole said it was the worst presentation with respect to numbers that he had ever heard from a company in difficulty.

Q Apart from that characterization, what, in substance, did they say?

A Well, I have told you.

Q That is all?

A That is what I remember of it.

Q Following that shock on December 16, I guess it was, did you have a subsequent telephone conversation with Mr. Rose?

A Yes, I did.

Q Was this on or about December 22, 1971?

A That is correct.

Q Did you make a memorandum of that telephone conversation?

A I did.

Q You have before you a document in evidence

marked Plaintiffs' Exhibit 1398. Is that a copy of the memorandum you prepared immediately following your telephone conversation with Mr. Rose?

A It is.

Q I call your attention to the second paragraph on the first page, if I may. The first sentence refers to Mr. Rose's report:

"Mr. Rose indicated that the major part of his company's problem relates to returns of $15 million from selling outlets."

My question deals with the next two sentences, where Mr. Rose says:

"He said that his company does not sell on consignment and that it was not making guaranteed sales, the difference being that in a guaranteed sale, the retailer owns the merchandise while it is in the store, but still has the right to return it to the manufacturer for a refund. Even so, he admits that merchandise was not moving in retail outlets fast enough to absorb inventories and that he became aware of this around August 20, because of relatively slow collections. Normally, Topper and other toy companies will accept returns if they have overshipped and also will allow customers to return merchandise in one line and substitute an equivalent volume

in another toy product group."

I would like to call your attention to what seems to be a distinction that Mr. Rose is drawing there between, on the one hand, a guaranteed sale and consignment, and on the other, the acceptance of unsold merchandise in return. Did you understand that to be a distinction he was drawing?

A The distinction that I had in this was that this was completely at odds with everything else I had been told before about the rights of customers to return goods to the company, and it was really a shock, and, in fact, I think I dictated the memorandum and walked out of the office. You know, it was just at odds with what I had been told by Rose on the 4th, and what Mr. Mole and I had been told by the entire management with the investment banker there on September 1, and that Grover Johnson had indicated this practice had been discontinued.

Then the part about the collections, this is something that I felt certainly that First National City Bank would have in their possession, and I just didn't see how they could not tell us about this in light of the conversation that I had with Waldman on August 27.

Q Following this conversation with Mr. Rose, which is reflected in this memorandum, where you reported to

Mr. Mole via this memorandum re Rose's statement that collections were slow and down in August, did you have any conversation with Mr. Mole on this subject?

A Excuse me? Did I say they were down or slow in August?

Q Slow in August.

MR. WOLLEN: He says they were relatively slow.

Q Did you discuss that with Mr. Mole following your conversation with Mr. Rose?

A Yes, I did.

Q Can you give us the substance of that conversation?

A Well, Mr. Mole said I should get the materials that we had used in evaluating this private placement together and bring my memorandum in and let us see if we should have known about this problem, and this is the only thing we could come up with, was this trade practice, which I had been told by Rose, and I believe that conversation a day earlier, ~~Burns~~ BYRNES 2, of Hayden Stone had mentioned this same practice of returns from distributors, and that we really were not aware of that in the work that I had done on the industry, but we thought we had covered the topic for the reasons that I said before, of sales being final, and the representations that consignment

practices were no longer being carried on, and also the bank's attestment that the current financial condition of the company was sound.

Q Is the point you just made in your testimony that is covered in that paragraph, the last paragraph, beginning at the bottom of page 1 of Plaintiffs' Exhibit 1398? Would you read that, please?

A "I have re checked the annual report and the C. B. W. L. material, including the April prospectus and I found no mention of returns or of the company's practice of selling subject to refunds for overshipments. Moreover, while I was not smart enough to ask the question directly in our discussions, we were told that (1) receivable losses were on the order of magnitude of only $150,000 in 1970; (2) that sales were final sales, not legally subject to refund; (3) the company was hard-nosed about making customers accept comparable dollar volume merchandise if they asked to return slow moving items."

Q You are testifying that following that conversation with Rose in your preparation of this memo you had a discussion with Mr. Mole on this subject?

A Right.

Q Was the question raised in the course of that discussion as to whether or not there should be a meeting

with Citibank?

A I don't believe at this particular time. You are talking about December 22?

Q Or soon thereafter.

A Yes, I believe the decision to approach Citibank was made December 29 or 30.

Q Will you tell us how that issue came up?

A Well, in our efforts to find what went wrong, I asked the company to supply us with the Financing Agreement that the bank had, and they did this, together with amendments to it, one in mid-July and another two days before my conversation with Mr. Waldman. I believe that second one was August 25.

Q On that subject, you have before you, I believe, documents in evidence marked Plaintiffs' Exhibits 543 and 546. Are those the documents to which you are referring?

A Yes, they are.

MR. BICKS: Do you have those, your Honor?

THE COURT: Yes.

Q At any time prior to the Private Placement were you aware that the Finance Agreement had been amended at any time during July?

A No, I was not.

Q Apart from an amendment at any time prior to the

Private Placement, were you aware that in July Citibank had "agreed to temporarily increase the overall line of credit available to the company to $21 million"?

A I was not.

Q At any time prior to the Private Placement were you aware that any increase in line of credit was "to be available to August 15, 1971"?

A No.

Q Were you aware at any time prior to the Placement that Citibank had agreed to increase Topper's available credit to "include advances up to $3 million in excess of our normal 80 percent advance against eligible assigned accounts recivable"?

A I wasn't.

Q With regard to Plaintiffs' Exhibit 546, at any time prior to the Private Placement were you aware that Citibank amended its financial agreement with Topper in August?

A I was not.

Q Were you aware, apart from the formality of an amendment, that Citibank in August agreed to continue to September 30, 1971 "the temporary increase in the overall line of credit available to the company of $21 million"?

A I wasn't.

Q Mr. Thompson, in fact, was September 30th two days after the Private Placement?

A It was.

Q At any time prior to the Private Placement were you

aware that Citibank had committed itself that the increase in its overall line of credit was to "include advances up to $4.8 million in excess of our normal 80 percent advances against eligible assigned accounts receivable"?

A No.

Q These documents first came into your possession in late December, you say?

A Around December 29th, I believe.

Q And apart from not having the pieces of paper, is the substance of your testimony that the facts reflected in the pieces of paper were not known to the Pension Fund prior to the Private Placement?

A The facts were definitely not known to the Pension Fund.

Q So the Pension Fund learned about these --

MR. WOLLEN: Let us ask about Mr. Thompson. He can only speak from his own knowledge.

THE COURT: If that is a summation, you can save it.

MR. BICKS: My summation?

THE COURT: I say you can save it for your summation.

MR. BICKS: What?

THE COURT: The question you were about

to ask.

MR. BICKS: No, I wasn't. I was about to go on to what he did.

THE COURT All right.

Q Following your receipt of these two pieces of paper from Topper did you have a discussion with Mr. Mole?

A We had a meeting with Mr. Orenstein and others from Topper at our office.

THE COURT: You and Mr. Mole?

Q Mr. Mole, I believe Mr. Weill was there of Hayden Stone, who was the director on the board of Topper, somebody named Henry Clarke was there, there were various attorneys there, I believe a representative of Connecticut Mutual was there; and this was really Henry Orenstein's more elaborate description of what went on that caused the company's difficulties and I believe the first follow-up on that December 16th conversation that we had at our office, and part in preparation for that I had asked to get these financial agreements -- at least that's the way, you know, I remember it now -- and after that meeting it appeared that there were substantial returns to the company that were not explained by anything that we had been told and that First National City Bank was in possession of data that would have been very helpful in evaluating this

private placement from an investment point of view and that they hadn't made that known to us and in fact it seemed from the tip of the iceberg evidence that we had that the company had gotten in difficulties in the very areas that they had attested for its health.

So we I don't believe ever left the conference room and we got on the telephone, or I did, to call Mr. Waldman's secretary and said, "We want to see him just as soon as possible."

Q Did you discuss this with Mr. Mole before you did this?

A Mr. Mole was there. I mean, that was our reading of it, that we trusted these fellows and we had put our money into this company after having asked them to attest for its financial condition and now we find there appear to be serious problems in it and we want to go up and talk about them, talk to them about it.

So I called Waldman's secretary -- in fact, I had a devil of a time getting through to him without his telephone number -- and said that I wanted to see him the first business day of the new year at 9 or 10 o'clock. I believe he was on vacation that day, so it was set up for 10 o'clock the next day, and I told him Mr. Mole and I would be up there to see him, or told his secretary that.

And so that was the background of how we went up to see First National City Bank early in January.

Q Did you in fact go to see First National City Bank early in January of 1972?

A We did.

Q What was the date of that visit?

A January 4th.

Q Prior to your visit on January 4th did you prepare any notes with regard to points or issues you were to raise at your meeting on January 4th?

A I did.

Q You have before you the document in evident marked Plaintiffs' Exhibit 1400. I ask if those are the notes you prepared in preparation for your meeting with Mr.Waldman on January 4th.

A They are.

Q I call your attention to paragraph 3 of those notes. There you state, and I quote: "We checked with FNCB on Monday" crossed out "Friday, August 30th" crossed out "27th and obtained a favorable reading on Topper even though the bank on Wednesday, August 25th had written the company regarding its loan of $4.8 million against ineligible security and had given the company an extension which coincided almost to the day with the closing on our

debentures."

What was the basis for that statement?

A The basis was those two amendments to the Financial Agreement that you have just -- that we have just talked about.

Q And those came into your possession after the Private Placement?

A That is correct, around December 29th or thereabouts.

Q I call your attention to paragraph 4, which states:

"We pay FNCB $100,000 a year for investment services and have a right to expect more for our money."

What was the basis for your statement or knowledge as to what the Pension Fund paid Citibank?

A Mr. Mole told me this was the order of magnitude of the figure that we paid Citibank.

Q You accompanied Mr. Mole on January 4th to meet with Mr. Waldman?

A I did.

Q Was anybody else present from Citibank?

A No one else.

Let me clarify. Mr. Waldman was the only one from Citibank at the meeting.

Q There were three of you present, were there not?

A Correct.

Q About how long did that meeting last on January 4th?

A About 45 minutes to an hour.

Q There are three documents before you each of which is in evidence. The first is PX 1391, the second is PX 1455, and the third is PX 1402.

Do you have those before you, Mr. Thompson?

A Yes, I do.

Q Can you explain the interrelation of those three pieces of paper?

A Let me go back a bit to this other exhibit, PX 1400, which we just looked at.

We wanted to be very clear in telling Mr. Waldman our complaint, so that Mr. Mole had this document in his pocket when we went up there. We did not show it to Mr. Waldman.

THE COURT: Which document is that?

THE WITNESS: This is the points regarding our meeting with FNCB tomorrow --

THE COURT: 1400.

THE WITNESS: Right.

THE COURT: All right.

A So he wanted to be sure that there was no misunderstanding and that we were very precise in what we told Mr. Waldman and he told me to be quiet in the meeting before going in.

THE COURT: Before the meeting he told you to be quiet, not to be quiet before you go in.

THE WITNESS:He did both.

A He said "WE are going up here to listen very carefully to what Mr. Waldman has to say," and we did this, and at one point I was going to say something and he motioned to me to basically be still. He was sitting here and Waldman was sitting there and I was sitting on a coach, so I don't think Mr.Waldman saw him motion to me.

When we finished with this meeting, we didn't say anything while we were in First National City Bank, but as soon as we got out on the street I wanted to talk about it, and he said "No. What we are going to do is we are not going to discuss it between us, but we will go back downtown on the subway and then you, Thompson, go in your office and you write a memorandum up of the meeting and I will go into my office and I will put down my thoughts about it on paper and then we will come together and we will compare what we put down."

The memorandum that reflects my thoughts on the Waldman January 4th meeting is this PX 1391 and then PX 1455 is Mr. Mole's handwritten notes that he made in his own office independently of -- well, that he made in his office by himself.

THE COURT: Yours is 1391?

THE WITNESS: Right.

THE COURT: I don't seem to have 1391.

THE WITNESS: 1391?

THE COURT: That is your memo?

THE WITNESS: That's my memo.

THE COURT: And 1455 is Mr. Mole's memo?

THE WITNESS: Mr. Mole's.

Q What is 1402, Mr. Thompson?

A That is the composit. Mr. Mole wanted me to put it down points 1, 2, 3, 4, you know, and not have the verbiage in there, but just list it in terms of key points, and so that's what I did in Exhibit 1402.

Q Apart from your memoranda, do you have any recollection as to what, if anything, Mr. Waldman said on January 4th with regard to his August 27th conversation with you?

A Well, he said he remembered the conversation with me and that he remembered that he had given the company a favorable rating, by which he meant in the discussion that

he hadn't mentioned any problems in the audits of receivables or that he didn't know of any problems in the financial condition of Topper.

Q And did he say that on the 4th?

A He said that -- his very word was that he had no inkling of anything being wrong, and "inkling" is a word that I remember to this day, at the time that I talked to him on August 27th, and he said, I believe, that he wasn't a party to either our financing or the Ford Credit financing and that in fact the company talked to him last about that.

Q Do you recall anything else Mr. Waldman said on January 4th with regard to what he told you on August 27th?

A I believe that he said that he was unaware that they were lending against ineligible receivables, but even if they were, that was permitted within the financing agreement.

Q Following your January 4th meeting with Mr. Waldman did there come a time soon thereafter when you reported on then recent events at Topper to the Committee on Finance?

A Yes.

Q You have before you a document in evidence marked Plaintiffs' Exhibit 1396-A, which appears to be a copy

of the memorandum to the Committee on Finance bearing the date January 10, 1972, bearing your name at the bottom. Is that the report you prepared shortly before the date it bears?

A Yes.

Q I call your attention to the sentence in the middle of paragraph 2 on the first page. It reads, and I quote:

"We wished to determine whether there were any problems with Topper and the bank's opinion of management capability and depth. FNCB knew that we were considering an unsecured loan to Topper and led us to believe that it knew of no problems in the situation."

Does that sentence, Mr. Thompson, refer to your August 27th conversation with Mr. Waldman?

A It does.

Q I call your attention to the paragraph third from the bottom of page 2, particularly the last sentence thereof, where you said, and I quote, "We emphasized that the bank's position will be materially improved by our purchase of debentures and the injection of the Ford Credit money in a company which never really existed as it was presented to us in September. Thus, since we had relied upon FNCB to attest to Topper's soundness in the very area that subsequently caused trouble, we asked to be

treated equally with the secured lenders."

Does that sentence refer to the position you expressed to Mr. Waldman, or you and Mr. Mole expressed to Mr. Waldman on January 4th?

A That is correct. I left out in that conversation that we had asked to be taken in on an equal basis with the secured lenders.

Q Yes. I would like to call your attention to this reference there, where you say "We relied upon FNCB to attest to Topper's soundness in the very area that subsequently caused trouble."

As of the time you wrote this memo, which was shortly before January 10, 1972, what did you believe to the very area that subsequently caused Topper trouble?

A I believed that it was the Spring Program that they had sent out in December of 1970 and the Dawn program, because Mr. Orenstein in his meeting on December 30th had indicated, I believe, they had about $15 million of returns which were largely related to the Dawn program, and I felt that with this program supposedly being paid off in the May to August interval that Citibank would certainly know that the cash wasn't coming in related to that and that in effect in fact they were amending their own agreement to reflect that and that the very least they could have told

us was that they were amending the credit agreement to reflect slow collections.

Q Mr. Thompson, do you have before you a document in evidence marked Plaintiffs' Exhibit 1456?

A I do.

Q Could you read it and tell us if you recollect the circumstances under which you prepared that document?

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BY MR. BICKS:

Q Mr. Thompson, do you have before you the document in evidence marked Plaintiffs' Exhibit 1457?

A I amnot sure I do.

Yes, I do.

Q Have you found it?

A Yes.

Q Subsequent to the preparation of your memorandum to the Committee on Finance on January 10th did you have a telephone conversation with Mr. Rose?

A I did.

Q Is the document identified as Plaintiffs' Exhibit 1457 a memorandum you dictated soon after your conversation with Mr. Rose and reflecting that conversation?

A Yes, it is.

Q I call your attention to the third paragraph, where you state:

"I asked Mr. Rose if FNCB was watching collections in July and August and he said that it was. He said the bank knew of the company's collection problems in July. This means it could not represent to us that it did not have any inkling of what was happening to the aging of receivables when Mr. Waldman spoke to me in August."

Do you recall asking Mr. Rose that question and him responding as indicated here?

A I remember that very clearly because when I asked the question, Mr. Rose just laughed and then he went on to tell me the information here.

Q What do you mean, he just laughed?

A Well, boy, was the bank watching this and were they concerned about it, the collection problem.

Q The paragraph before that, I call your attention to it, if I may. There you state, and I quote:

"Mr. Rose said that receivables which become past 60 days due in a month are not considered ineligible until the end of that month for lending purposes. Thus, the uncollected portion of the spring program which should have been paid on May 10th was not considered ineligible until the end of July."

In the course of that conversation did Mr. Rose give you the figures or any figures as to the percent of more than 60 day past due receivables as of the end of July?

A I asked him for those figures and I asked him to put it in writing and send it to me.

Q Did he subsequently do that?

A He did.

MR. BICKS: Your Honor, there is a document which was inadvertently omitted in the sequence given to you and offered in evidence this morning, and that is Mr. Rose's response. I offer in evidence Plaintiffs' Exhibit 1406.

THE COURT: Received.

(Plaintiffs' Exhibit 1406 received in evidence.)

Q Mr. Thompson, you have before you a document in evidence marked Plaintiffs' Exhibit 1406.

A I do.

Q Is that the letter Mr. Rose sent you or a copy of the letter Mr. Rose sent you following the phone conversation about which you just testified?

A Yes, it is.

Q I call your attention to the second paragraph, which recited past due, and, therefore, ineligible receivables reported to the bank as follows:

"June, 1971, $1,268,569.34

"July, 1971, $7,244,510.07

"August, 1971, $6,987,727.42"

My question is, is that the first occasion that you were aware that there was a 600 percent jump in 60 days or more past due receivables between July 1 and August 1 of 1971?

A Yes, it was, and it was particularly interesting because this was the first time that these ineligibles had been termed "past due." I had talked to Rose over the phone and tried to be very careful in my terminology with him because during this period I was really using Rose as a source of information to find out what went wrong in the situation, and Rose on his own referred to these as past due and ineligible. In other words, I asked what the bank was looking to for the good, eligible receivables, and they could really define what was left over any way they wanted to.

Q Did there come a time following your receipt of this January 15 letter when you again had occasion to meet with Mr. Waldman?

A Yes, I met with Mr. Waldman later in January, I believe on the 24th or 25th of January.

Q Do you have before you a document in evidence marked Plaintiffs' Exhibit 1404?

A I do.

Q Would you look at it and let us know if that is a memorandum you dictated soon after the meeting with Mr. Waldman to which you have just referred?

THE COURT: What is that exhibit?

MR. BICKS: 1404, sir.

A It is.

Q I call your attention to the fourth paragraph on that page which reads:

"He discussed the difficulty of forcing the customers to pay receivables even though the sales were final sales from a strictly legal standpoint. He told us that any one-season business such as the ski industry or toy industry employs a common trade practice of returns being allowed after Christmas so that it was normal for Topper to receive returns if it overshipped to its customers."

My first question, Mr. Thompson, whom does the "he" refer to?

A It refers to Mr. Waldman.

Q My second question is, did you understand the normal trade practice to which Mr. Waldman referred on the 25th to be the same trade practice to which Mr. Rose had referred in his conversation with you on or about December 22?

A Well, I thought Mr. Waldman was talking about the ski industry and returns after a season and that it was similar to this practice of returns of overshipments from distributors. I guess the answer is basically yes.

Q It was the same problem that Mr. Rose was

adverting to? The same practice?

A Yes.

Q Was this the first time in your presence that Mr. Waldman had indicated his knowledge of that trade practice?

A It was.

Q I call your attention to the first paragraph beginning on the top of page 2. Do you have that in front of you?

A I do.

Q That reads:

"In the course of the conversation, we discussed why the company had to pay $19,000 for the electric light bill yesterday and was under pressure to pay a portion of the $50,000-$60,000 to IBM for its computer rentals. We indicated that the order of magnitude of these bills indicates that Topper was very slow in paying trade creditors. Mr. Waldman said that 'Topper was always slow, even when it made a lot of money.'"

Is this the first time you ever heard or were advised that Topper was slow in meeting its creditor obligations?

A The day before or shortly, a couple of days before this came out in the conversation with Mr. Rose,

that basically they were coming in to turn off the lights, and I asked Mr. Waldman --

THE COURT: The question is, is this the first time you heard about the slowness?

THE WITNESS: No, I heard about it from Mr. Rose a day or two before.

MR. BICKS: Thank you, your Honor.

Q Mr. Thompson, you have before you a document in evidence marked for identification as Plaintiffs' Exhibit 542. As far as I know, you have not seen that? You did not see it at any time?

A I never saw it before.

MR. BICKS: Your Honor, this is a memorandum prepared by Mr. Morton J. Siegel, assistant vice president of Citibank, of whom you have heard something during the trial, bearing the date July 15, 1971.

Q As you can see, the first paragraph states:

"On July 13 and 14 the following were present at a meeting in our office."

And it refers to three people from Topper and three from the bank, including Mr. Waldman, the other party to the conversation a month later.

Mr. Thompson, will you read that memorandum?

A "The purpose -- "

Q No, to yourself.

A I have read it.

Q Sir, I call your attention to the second paragraph at the top of page 2, which reads:

"With regard to the discussions of collections, client advises that they are meeting some resistance by their distributors insofar as bills and invoices which are now due for payment, which customers claim that most of these goods have not been sold as yet."

Any time prior to the Private Placement were you advised of any resistance on the part of distributors to pay invoices as due?

A No.

Q Were you advised at any time prior to the Private Placement that "customers claim that most of these goods have not been sold as yet"?

A No, I was not.

Q I call your attention to the next paragraph which reads:

"Along these lines, our records indicate as of June 30 that the following represents moneys due which as yet have not been collected, 30 days, $800 ~~million~~ thousand, 60 days, $6,600,000; over 60 days, $3,500,000."

At any time prior to the Private Placement were

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you aware that as of June 30, $3 1/2 million in receivables were more than 60 days past due?

A No.

Q I call your attention to the next paragraph, where Mr. Siegel of Citibank writes:

"In lieu of these slow collections, the additional expense of the new line, the client has requested that we provide some leeway in our present guideline as a bridge until the debenture funds and the Ford monies are received."

Were you aware at any time prior to the Private Placement that Citibank had made a bridge loan to Topper to tie it over until the Private Placement funds came in?

A Definitely not.

Q I call your attention to the last sentence in that letter, next to the last paragraph:

"The overadvance is an anticipation of an increase of the past dues which occur at the end of July..."

At any time prior to the Private Placement were you aware that receivables were more than 60 days past due and, in fact, had increased at the end of July over their level at the end of June?

A No.

MR. BICKS: I have no further questions.

CROSS-EXAMINATION

BY MR. WOLLEN:

Q Mr. Thompson, during your direct examination you were examined about a number of memoranda that you wrote in connection with Topper. Did you attempt in writing those memoranda to record as accurately as you possibly could the events that you described?

A Yes, I did. I dictated the memoranda. The memoranda didn't purport to include everything that was important in there, but I was trying to be accurate in them.

Q Mr. Thompson, do you remember testifying during the pretrial proceedings in this case?

A Yes, I do.

Q For some three, four, or maybe five days, a long time?

A In 1973 through 1975 or into early 1975.

Q One thing at the outset, Mr. Thompson, is there any doubt in your mind that right from the beginning of the time when you first learned about the Private Placement, that the moneys to be raised by Topper were going to be paid to the banks to pay down the bank line of credit?

MR. BICKS: Objection as to form. He certainly

is free to ask Mr. Thompson if he knew that the proceeds of the Private Placement were going to the banks.

THE COURT: I thought he did ask him that.

MR. BICKS: I say the lead-in, "Is there any doubt in your mind" was objectionable.

THE COURT: What is wrong with that? Overruled.

A No, this was stated in the Private Placement memoranda.

Q You knew that from the beginning?

A Yes.

Q Mr. Thompson, in 1971 would you estimate for us the total value of the assets held by the U. S. Steel and Carnegie Pension Fund, approximately?

A A very rough approximation would be over $3 billion.

THE COURT: $3 billion?

THE WITNESS: Yes, your Honor.

MR. WOLLEN: Could we have Citibank Exhibit 150, which was just received in evidence, please?

Q Let me hand you my copy of Citybank Exhibit 150, Mr. Thompson, and ask you to take a look at it.

A Yes.

Q Does that memorandum refer to the meeting about which you testified yesterday that you attended at Citibank,

which was one of the periodic meetings that Citibank had for people at U. S. Steel?

A Yes, it does. It was the meeting where I met Walter Jeffers ~~in~~ which he arranged.

THE COURT: Who is he?

THE WITNESS: Your Honor, he is their economist, I believe their chief economist.

Q Why don't we go down the list. Do you know who George Lingua is?

A I believe he was the senior investment officer in charge of the Pension Fund, money management sector of the bank.

Q George Egbert?

A He was another investment officer there.

Q Walter Jeffers we have already heard about.

Do you know who Phil Hessler is?

A No, I really don't.

Q Could that possibly be Heston instead of Hessler?

A It could be. I don't have any recollection of ever having seen the man before or after this meeting.

Q In 1971, Mr. Thompson, can you approximate for us what the approximate dollar range was of the Pension Fund's initial investments in securities through

private placements?

A Excuse me, would you repeat the question?

Q The Pension Fund purchased $3 million of Topper debentures. What is the approximate dollar range of private placements that the Pension Fund participated in?

A I couldn't -- I don't know that number.

Q You can't estimate?

A Not accurately.

THE COURT: Would it be inconvenient to you to move yourself over here so I kind of get in on this conversation?

MR. WOLLEN: I am sorry. The problem is I do have some exhibits.

THE COURT: Why don't you move it over here because you and the witness are talking and I can't hear it.

Q I believe you testified yesterday, Mr. Thompson, that you had been approached to invest in Topper sometime prior to the summer of 1971.

A I don't know whether I testified to it, but that is correct.

Q Whether you testified to it or not, it is correct, is it not?

A Yes, it was with regard to a June 1970 common

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stock financing of Topper.

Q Who approached you in that regard?

A I believe the salesman who was covering the U. S. Steel Pension Fund account named Nick Luongo approached us and Glover Johnson also approached us with respect to that financing.

Q The salesman who was covering the U. S. Steel account at Hayden Stone?

A That is correct.

Q Did you participate in that offering?

A We did not.

Q In fact, had you had any dealings with Hayden Stone, yourself, personally, prior to the Private Placement?

A They had telephoned us regarding investing in, I believe, some other private placement situations, but I had never met with the management nor had I received a private placement memorandum from Hayden Stone. I had turned those down over the telephone.

Q So you had never accepted, in effect, an invitation from Hayden Stone to participate in an offering prior to the Private Placement?

A That is correct.

Q Isn't it a fact, Mr. Thompson, that you turned down the offering made to you in 1970, that you have just

described, in part because of the risks involved in the toy business?

A The two reasons that I recall turning down that offering were the past history of Topper, which was closer than, I believe, in 1970 to the point in time at which they began to report a profit, which was 1968, and the thing that stuck out in that red herring was the turbulent past history of Topper and the other thing was the heavy dependence upon borrowed money for the company's operations.

Q I ask you specifically about the risks in the toy business. Are you testifying that that was not one of the reasons why you turned down the offering in 1970?

A I am giving you the two prime reasons that I turned it down. There was no meeting or real discussion of Topper at that time. When the salesman at the luncheon tried to bring it up to me, even though he said that he wasn't going to do it in arranging the luncheon, I just cut him off and in effect said, don't waste my time on this one, it is not a prudent investment for a pension fund and let's talk about something else.

Q You testified yesterday about Mr. Inglis approaching you sometime in late July, I believe you said, or early August of 1971.

A My recollection is it was late July of 1971. It could possibly have been early August.

Q At that time did you discuss with Mr. Inglis the fact that you had turned down this offering in 1970?

A I believe I did mention that we had looked at Topper before and hadn't considered it a suitable investment for the Pension Fund.

Q Did you discuss with Mr. Inglis the high concentration of Topper sales in the Dawn line?

A Now, is your question with reference to the telephone conversations?

Q Yes, sir.

A I don't believe so.

Q Did you discuss that with him on the morning of August 4 when you met with him?

A We discussed it with reference to the Dawn program, including both the Spring $14 million Program and the overall product line, so I am not sure that it was with specific reference to the concentration. This was a poor product that they now had, that they would have just been establishing themselves with in 1970.

In other words, I believe Dawn was introduced at the Toy Fair in 1970 and I looked at this other offering in the spring, let's say March, April or May of 1970, so

that Dawn was hardly on the market at that time.

He cited it as a reason why this was a different company and we should do work on it now after my having said to him, you know, you tell me why it is different.

Q As you sit here today, Mr. Thompson, can you recall approximately what percentage of Topper's 1970 sales were attributable to the Dawn line?

A I believe it would be roughly $30 million out of $64 million is a rough approximation.

Q A little bit less than 50 percent?

A That is correct.

Q As you sit here today, can you tell us, if you recall, what percentage of Topper's projected 1971 sales were attributed to projected Dawn sales in 1971?

MR. BICKS: Your Honor, I wonder about the relevance of what Mr. Thompson knows today as distinct from what he knew prior to the Private Placement.

THE COURT: I will allow it.

A Roughly I think it would have been the same order of magnitude, but I would have to look at the projection at this time. I think it was $70 million and $30-plus million in sales for Dawn in 1971.

Q You certainly knew those figures in the summer of 1971, did you not?

A Yes, I did.

Q You discussed it with Mr. Inglis?

A The point in time which I had the discussion would have been with Mr. Rose after receiving his August 18 failsafe letter in which he gave a breakdown by product line. I discussed it really more with him than with Mr. Inglis.

Q At some time prior to the summer of 1971, had you considered on behalf of the U. S. Steel Pension Fund an investment in Mattel?

A I really never considered an investment in Mattel. I attended one afternoon meeting that this Bill Schwartz hosted, but I made up my mind really at that meeting that I wanted nothing to do with Mattel.

Q Do you recall whether at that meeting there was any discussion of the Barbie doll line that Mattel had at that time?

A I am sure that there would have been.

Q Was there any discussion at that meeting of the percentage of Mattel sales that were attributable to the sales of the Barbie doll line?

A When you say "percentage of sales," Barbie was a very important part of Mattel's business, which I believe was some $350, $400 million in sales, and I don't

remember whether the number was $50 million or $150 million out of that mix of business, but they were doing a lot of volume in Barbie dolls.

am

Q Was the volume that they were doing in Barbie Dolls one of the reasons why you did not further invest in Mattel?

A It was not so much the volume in the business, but the fact the product had been on the market for about 15 years, and at some point, you know, you will have competition come in. There were a number of reasons for that meeting. One is, I didn't trust the management. I spoke with Mrs. Handler, the president of the company, in the cocktail hour afterwards.

Another reason, they had a man there who was a very mod looking individual who just sold a goldfish company to Mattel. I think they were buying Ringling Brothers, Barnum & Bailey Circus, and it did not seem to be a very suitable investment.

An additional factor, the group of people that were purchasing this stock, which was on the open market, I would categorize as gun slingers. There were statements in the cocktail hour that did not bear with the formal presentation. They made a big to do about their product development capabilities, and Mrs. Handler said that basically her husband, who was chairman of the board, sat on the floor in the living room with the grandchildren and picked out the toys they wanted made.

Q So you did not further invest in Mattel?

A No, I did not.

Q You testified yesterday about receiving the Private Placement Memorandum from Mr. Inglis after the first telephone call?

A Correct.

Q I believe you said that the Private Placement Memorandum had attached to it the Prospectus from Topper's spring public offering?

A Actually inserted in my copy of it.

Q Physically?

A Physically, yes.

Q I believe you said you read the Private Placement Memorandum and Prospectus?

A I did.

Q Did you read the section in the Prospectus relating to risk factors?

A I did.

Q Do you remember now any of the points in that section which you thought important at that time?

A Well, the thing that still came over to me after reading it was that this company had had a history up until 1968 of substantial losses. It was also dependent upon bank financing; there was certainly an

implication in it that it was a one-man company because there was a large insurance policy on the life of Henry Orenstein. These would have been the principal factors that I remember right now about that prospectus.

Q You did read it?

A I did.

Q Did you read the financial statements contained in the Prospectus?

A Yes.

Q Do you remember whether those were certified financial statements?

A They were.

Q By whom?

A Arthur Young.

Q Had you heard of Arthur Young before that?

A Yes, I have.

Q Who were they?

A They would have been one of the top ten auditing firms.

Q Do you remember for what period those financial statements were?

A No.

Q You do not recall for what period of time the financial statements contained in the Prospectus covered?

A I don't at this time. It would have been five years. The only answer I can give you is "no."

Q Mr. Thompson, do you know what a cold comfort letter is?

A I do now, yes.

Q Did you know in the summer of 1971?

A No.

Q Did anybody ever mention to you in the summer of 1971 that Topper had received a cold comfort letter in the spring of 1971?

A No.

Q You did not know that?

A I did not know that.

Q Do you recall whether the Prospectus you say was inserted in the Private Placement Memorandum had unaudited financial information for Topper's first quarter of 1971?

A It did.

Q Did you know at that time whether in connection with the public offering the issuers were required to obtain an update of their most recent certified financial statements from their accountants?

A I did not then.

Q You did not then?

A I did not.

Q Mr. Thompson, do you recall from your review of the Private Placement Memorandum and the Prospectus that was inserted therein whether Topper's net income for 1970 was higher or lower than its net income for 1969?

A I don't recall it clearly. I believe they were discontinuing a cosmetic business, so there was a restating of income. The place that I looked at for the income trend in Topper was at the very beginning of that Private Placement Memorandum which had set this out from 1969, and it projected $5 million for 1971.

Q Would that have been described as income from continuing operations?

A I believe so. I would have to look at the Memorandum to be sure. But I believe you are correct.

Q You do recall that Topper had discontinued some operations in the years prior to 1971?

A Well, the one that I remember was a ~~youths'~~ Youth Care children's cosmetic line which they had gone into as a move to diversify, and I believe with Orenstein insisting that they do it over Rose's objections, and they lost money in it and were getting out of it.

Q Did you review the projections set forth in the Private Placement Memorandum?

A What do you mean "review"?

Q Did you read them?

A I read them, yes.

Q Did you know at that time that for the years after 1971 there were no short term bank borrowings listed under liabilities?

A I would have looked at that, but the key period that I focused in was 1971 and then out to 1972, and if you look at my decision memorandum, you see I cut off the projections at that point in time. I was trying to be sure that going into this situation that we had a soundly financed vehicle, and you hope they do what they say they will do thereafter, but you really want to be sure that initially going into it ~~you~~ you've got a soundly financed company.

Q By your decision memorandum, you mean your decision to the Committee on Finance, dated December 2, 1971?

A Yes.

Q Which has been introduced into evidence as Plaintiffs' Exhibit 1370. Let me show you, if I may, Mr. Thompson, a copy of that. Let me hand you that memorandum.

THE COURT: What is this memorandum?

MR. WOLLEN: September 2, 1971.

THE WITNESS: It is the one recommending the

investment in Topper.

Q Were you referring to the attachment to that memorandum in your recent reference?

A You don't have the second page of the attachment on this copy. It is Plaintiffs' Exhibit 1370. I've got the one here that has.

MR. WOLLEN: Your Honor, none of the copies we have ~~have~~ has a second ~~copy~~ page.

THE WITNESS: This is what I am referring to.

Q I thought you were referring to the existence of short-term borrowings. Could you direct me where on that page that is listed?

A I am sorry. I did not understand the question that way. Could you repeat it?

Q I thought when asking you as to whether you had discerned from projections contained in the Private Placement Memorandum that it did not list short term bank borrowings for a period at the end of 1971 and thereafter, and I think you refer to this memorandum as reflecting that.

A I did not understand the question that way. If you put to me the question you want me to answer, I will try to answer it.

Q Was it your understanding, Mr. Thompson,

that Topper did not expect to have any short-term bank borrowings by the end of 1971 and thereafter?

A Yes.

Q Do you recall Mr. Bicks asking you some questions about this memorandum yesterday, Plaintiffs' Exhibit 1372?

A Yes.

Q You testified this is the memorandum you dictated the day after you came back from your visit at Topper?

A Right.

Q The first paragraph on the first page, Mr. Thompson, do you see the sentence starting "On Balance"?

A Yes, I do.

Q Will you kindly read from there through to the end of that first paragraph out loud for the record?

A "On Balance, while Topper must continuously make changes in its product line within a standard frame-work of dolls, trucks, et cetera, the company seems to have more than average stability for the industry as 60 percent of its approximate $65 million of sales now comes from lower priced 'bread and butter' items that have less of a seasonal or fad element. Moreover, larger toy companies such as Topper are able to adjust promotion to consumer

response much easier than smaller, family-dominated concerns and thereby limit their exposure to any given product. For this reason, I believe that a large pension such as ours can afford to have a participation in this industry when the risk-reward ratio seems attractive."

Q In that section you just read, the reference to "bread and butter" items would include the Dawn line?

A Yes, it would.

Q Mr. Thompson, will you read for the record the last paragraph of the memorandum on page 3?

A "This seems a reasonable deal for us where we have some protection and a full convertibility in the event the company lives up to its projections. At present, we can obtain a participation of $3 million in the issue and Jay Inglis indicated that our conversion price might even be under the market if the stock continues to rise. If you concur, I would like to do this deal."

Q Thank you.

Do you remember yesterday, Mr. Thompson, testifying about the conversation you had with Mr. Bill Schwartz, I think his name was?

A Yes.

Q Did you call Mr. Schwartz or did he call you?

A I believe I called him.

Q Do you recall how it came about that you did that?

A Yes, there was an article in the Wall Street Journal, the Heard on the Street column, and Schwartz' name was mentioned in this, and he had some reservations on Topper, and I called him to ask him about that.

Q Do you recall approximately when that was?

A I believe it was on August 10th.

Q Let me hand, you, Mr. Thompson, that which has been introduced as Plaintiff Exhibit Richards' 1 and ask you if you can remember whether that was the Wall Street Journal article you just testified about.

A I believe it is. My copy is not very clear, but it looks like the same one.

Q When you read the article did you note the reference in it to the fact that Topper had a much less exclusive relationship with Sesame Street than you had been led to believe?

A Yes, I did.

THE COURT: Much less what?

MR. WOLLEN: Much less exclusive relationship with Sesame Street than Mr. Thompson had been led to believe.

THE WITNESS: May I say "led to believe" has an implication in it that I would not put. I would say that my was

understanding of the relationship.

Q You did get from that article that Mr. Schwartz, at least, was reported as saying that the issue can be held as a speculation, did you not?

A Yes, I read the article completely at the time.

(Continued on next page.)

Q So, thereafter, you also noted that a Mr. McAlinden said, "It isn't for widows and orphans."

A Right. Let me say that I think the Schwartz comment was referring to a common stock investment rather than a debt private placement vehicle.

Q Do you know who Mr. McAlinden is?

A In this ride back from Elizabeth with Orenstein on August 4, at which I found out that Mr. Waldman was the senior man on the account and got the clearance to go to the bank from the company, I also asked Orenstein who in the Street followed Topper and the two people that he mentioned were Schwartz and McAlinden, but he had McAlinden at Merrill Lynch and he also said he didn't think he knew much about the toy business and his interest in it was really buying Topper at 15 and selling it out at 18, so I really don't know the man and that's really the full extent of my knowledge.

Q You never tried to contact Mr. McAlinden?

A No, Orenstein didn't think he knew much about the business and we had no relationship with Argus Research, which this article says that he was employed by.

Q Did Mr. Orenstein think that -- did he report to you that Mr. Schwartz knew much about the toy business?

A I don't believe the comment was really with

reference to Schwartz' knowledge. I think Orenstein thought that they were the best of the lot, but he distrusted Schwartz because Schwartz was a young fellow who had made a reputation for himself by recommending Mattel stock, which was then at about 35 times earnings, and he believed that Schwartz was more interested in getting information on Topper's operations to pass on to Mattel than he was in taking a good faith look at Topper as to whether to recommend it or not.

Q Was it because of this article that you decided to call Mr. Schwartz?

A Yes, and I had met Mr. Schwartz, as I have said before.

Q I take it since you read the article, Mr. Thompson, you noted the statement in it that "Dawn dolls mightn't live up to sales expectations."

A Could you tell me where that is?

Q Certainly, it is at the end of the third from the last paragraph.

A This is McAlinden's instead of Schwartz now?

Q That is correct.

A Yes.

Q You also noted at the top of that same column a statement that about "$14 million of company's volume

last year came from customers who were given 5 to 8 months to pay their bills." In other words, customers were using Topper to finance their business, you noted that statement.

A Yes, I did.

Q Of course, you already knew about the $14 million of the company's volume from customers who were given 5 to 8 months to pay, did you not?

A I did know that from the Private Placement Memorandum.

THE COURT: You did know it?

THE WITNESS: I did know it.

Q Prior to the article?

A Yes.

Q Mr. Thompson, do you see the statement in the last paragraph of that article, which says that Topper, as Mr. Orenstein says, he can't make any comment on earnings as the concern is in registration with a proposed sale of, it looks like 406,000 shares?

THE COURT: 496.

Q I think you are right, 496 thousand shares. Do you see that statement, Mr. Thompson?

A Yes, I see it.

Q You saw that on August 10, 1971?

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A Yes.

Q Did you ever ask anybody what registration Topper was in at that time?

A I don't believe so.

Q Were you aware prior to that article that Topper was in registration in August of 1971?

A I don't believe so.

Q Have you to this day ever seen the prospectus involved in that registration?

A I don't believe so. It might have been -- I just don't think so.

Q You certainly don't remember seeing it in August of 1971?

A I know I didn't see it in August of '71.

Q Did you ask anybody for it in August of 1971?

A No.

Q Did you ask Schwartz who the five or six potential investors were whom he had advised against participating in the private placement?

A No, I did not.

Q Did you ask Schwartz whether Topper sold goods on a final basis or on consignment?

A I did not.

Q Do you recall yesterday, Mr. Thompson, testifying

about conversations with ~~a~~ two gentleman from ~~Sayre~~ Zayre and J. C. Penncy?

A Yes, I do.

Q Did you make the initial calls to ~~Sayre~~ Zayre and J. C. Penncy?

A I did.

Q Who did you call at ~~Sayre~~ Zayre?

A I called Sumner Feldberg, who is the president of ~~Sayre~~ Zayre.

Q Continue your answer.

A And I called a fellow named John Hebard, who was assistant treasurer of J. C. Penney.

Q ~~Where~~ Why did you call Feldberg?

A We had a private placement in ~~Sayre~~ Zayre notes with warrants and I knew Sumner Feldberg because of that.

Q What did you say to Mr. Feldberg when you spoke with him?

A I asked him if he could put me in touch with the toy buyer in ~~Sayre~~ Zayre so I could get a trade check on Topper.

Q Why did you call the gentleman that you named at J. C. Penney?

A Well, I had just done a private placement sale/leaseback financing with J. C. Penney and worked with Mr. Hebard and I felt that he would, you know, be the one

to contact there to have somebody in J. C. Penney get back to me as a trade check.

Q Do you have in front of you, Mr. Thompson, Plaintiffs' Exhibits 1375 and 1376, which are your two memoranda of conversations with the gentlemen from ~~Zayre~~ and J. C. Penney?

A I do.

Q With respect to Plaintiffs' Exhibit 1375, that is your telephone conversation with Mr. Hessdorf of ~~Zayre~~.

A Correct.

Q Would you kindly read to me the last sentence of the second paragraph.

A "Mr. Hessdorf believes that the company has done a good job on Dawn, but that Barbie still dominates the doll industry even after ten years in its price bracket."

Q With respect to Plaintiffs' Exhibit 1376, would you read the entire third paragraph.

A "He considers Topper personnel honest and hard-working. When I asked him if the company is likely to be in business ten years from now, he answered, 'Yes,' ~~in quotes~~ but only after a pause for thought. He believes, like everyone else, that Sesame Street is a very

hot product which will provide some stability in the Topper picture for the next few years, but that Smartypants is a one or two year product."

Q You didn't ask Mr. Folan of J. C. Penney why he paused for thought before he answered you, did you?

A No.

Q I think that can be answered by a yes or no, Mr. Thompson.

THE COURT: He has answered.

Q Mr. Thompson, do you remember testifying yesterday that you had been told that the trade was angry at Mattel? Do you remember that?

A Yes.

Q And in part it was because Mattel had promised that they would make something up to the trade, but had not done so, wasn't that your testimony yesterday?

A They would do something good for the trade to make up for the fact that the trade had a heavy inventory position in Hot Wheels.

Q What was your understanding that they were going to do for the trade?

A The next time they got a hot new product, that they would ship it out to the people first that were over-inventoried in Hot Wheels.

Q Who told you that?

A That was my impression of it and that would have been Hessdorf of ~~Sayre~~ Zayre.

Q Mr. Thompson, who is Graham Harrison?

A In 1971 he was a vice president of the Pension Fund and he is now the president of the Pension Fund.

Q Did he participate in the Pension Fund's investigation of Topper?

A Yes.

Q What did he do to the best of your recollection?

A Well, the primary thing that he did was attend this August 13 meeting with Downs and Rose where we discussed this Example of Company Reporting booklets.

Q Do you still have Plaintiffs' Exhibit 1373 in front of you, Mr. Thompson? This was the memo of your telephone conversation with Mr. Schwartz.

A Yes, I do.

Q Would you read the first sentence of the third paragraph.

A "Pete Harrison had a check with the product development manager of Louis Marx, who indicated that the toy business is even worse than the garment business."

Q Pete Harrison is Graham Harrison?

A That is correct.

Q Who is Louis Marx?

A I believe it is another toy company. "He indicated that there" --

Q That is enough. I am sorry, just the first sentence.

Do you recall testifying yesterday, Mr. Thompson, about a meeting with at least Mr. Rose, and if anybody else was there would you kindly let me know, on August 13 with Topper people?

A That was Rose and Downs.

Q Downs, too?

A Downs, too, and Harrison and I.

Q Was that this meeting that you were given the Examples of Company Reporting that you referred to in your testimony yesterday?

A Yes.

THE COURT: You were given what?

MR. WOLLEN: The Examples of Company Reporting, which is --

THE COURT: I got you. I just didn't hear what you said.

MR. WOLLEN: Plaintiffs' Exhibit 1459.

Q Do you recall that the Examples of Company Reporting contained June 30, 1971 figures for Topper?

A Yes.

Q By the way, did you ever ask anybody at Topper for any later financial statements of Topper?

A I asked Mr. Rose in this August 13 meeting for later financial statements, and I asked him after that in a telephone conversation or in one of these drafting sessions pertaining to writing the purchase agreement for later financial statements, and then at the closing at a break I said, "Gee, has there been any change in the business or financial conditions in Topper since June 30?"

He at that point said that he had reviewed the projections item by item with Orenstein and that everything was fine.

Q So you asked Mr. Rose for later financial figures at least three times.

A Yes.

Q The latter two times being in Sepetemer?

A Right.

Q Did you ever get later figures before the closing?

A No.

Q During the August 13 meeting with Mr. Rose and Mr. Downs did you go over the Examples of Company Reporting.

A We went over it in the sense that we viewed

this as a sample of what they were doing, but we didn't go over it, you know, number by number in the exhibits.

Q Do you recall whether during that August 13 meeting anybody mentioned the fact that in the Examples of Company Reporting it noted that Topper had reported as of June 30, 1971, net accounts receivable of over $28 million?

A Well, we looked at that June 30 balance sheet, which had that number in it. I don't know the actual number, but we looked at the balance sheet.

Q Do you recall discussing the amount of Topper's accounts receivables at June 30, 1971 during this August 13 meeting?

A Not specifically. We looked at returns and we looked at the reserve associated with it of $570,000 and I believe Rose again said that bad debts would be under $200,000 and about $150,000.

Q Are you saying that you recall the reserve, but you don't remember what the gross figure was of the accounts receivable?

A I don't remember discussing the gross figure in detail, but I know we looked at the current assets and liabilities section of the balance sheet.

Q Do you remember discussing the net sales figure

contained in the financial statements for the first six months of 1971?

A Here again, we looked not, I think, at the financial statements, but there was a breakdown of the first half sales by product area, which we looked at, I think, which was much more detailed than just the one number in there of first half sales.

Q As you sit here today, do you remember whether the net sales figure for the first six months of 1971 was greater than or lesser than the figure for net accounts receivables?

A My impression is that, as I remember here, I believe the gross sales figure was about $21 million and the net sales figure was about $19 million and the accounts receivable were roughly $29 million.

Q That is your best recollection of it now?

A Right.

Q Do you recall whether that comparison was discussed during your August 13 meeting?

A Not in that framework.

THE COURT: What framework? What do you mean?

THE WITNESS: In other words, we looked at the financial statements of the company, you know, in that section of it and then we went on and we looked at the

breakdown of sales by product line, but we didn't relate the two together. We didn't try to reconcile the net sales with the receivables. It wouldn't and didn't seem out of line because they still had this $14 million Spring program that had been shipped out so that the receivables were about $8 million more than the net sales and the Dawn program or the Spring program was $14 million, which would be related to an $8 million figure, and it was really in the midst of coming due during that period. So, you know, it's now in retrospect, it is something that you would have liked to have pinned down, but at the time it seemed perfectly reasonable.

Q Are you saying that you weren't surprised at the figure because you assumed in that figure were sales under the Spring program?

A Well, the $21 million figure wouldn't have had the $14 million in it. That was reported in 1970, but the receivables would have had the $14 million figure in it.

Q During your August 13 meeting and your discussion of the examples of Company reporting did you discuss the amount outstanding to the banks?

A Here again, we looked at that, I think, but I don't believe we discussed it in any detail. In other

words, we were aware that they had bank loans of about $20 million outstanding.

Q Do you recall what figure for bank loans was reported in the Examples of Company Reporting as of June 30, 1971?

A My recollection is about $20 million.

Q Do you have in front of you, Mr. Thompson, Plaintiffs' Exhibit 1378?

A Yes.

Q I believe your counsel read to you yesterday certain portions of this -- first of all, this is your memorandum dictated after your August 13 meeting that we have just been discussing, is that right?

A Yes.

Q I believe your counsel read to you yesterday the last sentence starting on the first page. Would you read for me the sentence preceding that that starts off with the word "management." Just that one sentence.

A Leaving out the one between? "Management expects to close on a $7 million intermediate term loan with Ford Credit Corporation later this month and will use the proceeds from this, together with the money that it raises from its convertible debenture financing, to repay part of bank loans of $20.3 million."

Excuse me, there isn't a sentence in there. My copy is such that I thought there was.

Q It was your understanding when you wrote this memorandum that the bank loans were $20.3 million?

A Correct.

Q Was it also your understanding that the bank loans as of June 30, 1971 were in the area of $20 million?

A I am confused. Aren't we talking about the same thing? I mean I thought that the number on the balance sheet in Examples of Company Reporting was $20 million. Aren't you asking me the same question?

Q My $20 million was referring to the figure in your memorandum. What I am asking you is whether it is your best recollection that that is the figure in the Examples of Company Reporting.

A Yes, it is.

Q Do you have in front of you, Mr. Thompson, Plaintiffs' Exhbit 1459, which is the Examples of Company Reporting?

A Yes, I do.

Q Would you turn to page 7.

THE COURT: What is the date of that exhibit?

MR. WOLLEN: Page 7?

THE COURT: What is the date of ~~1479~~ 1459?

MR. WOLLEN: I am afraid it is undated. It is the bulky document on the long paper, which is headed "Topper Corporation, Examples of Company Reporting." I won't dwell on this, your Honor.

THE COURT: I have got it.

A I have page 7 here in front of me.

Q Would you read the first paragraph on page 7.

A This is in the note section. "Note 1 - bank loans. The company's financing agreement with banks provides for maximum working capital borrowings of $18.5 of which $18,551,714 was outstanding at June 30, 1971 at an interest rate of 3.105 percent per annum above the higher of the prime rate or 6 percent. The company had other bank loans of $1 3/4 million at June 30, 1971 at an interest rate of 1.15 percent above the prime."

Q Do you know what bank loans are referred to in that second sentence?

A There was something in the financing agreement section of the prospectus and it was my impression that this was really a non-loan. I mean, in other words, they never let the company take it out of the bank and it was a way of upping their interest cost or the interest amount that the bank group received here above this 9-plus percent figure that was implied in the first sentence.

Q So it is your best recollection that the same banks were involved in the two financings?

A My recollection is that two of the banks, and I don't know which two, were involved in this side agreement basically.

Q Do you have a recollection of whether one of the two was First National City Bank?

A I don't know specifically.

Q Do you still have Plaintiffs' Exhibit 1378 in front of you, Mr. Thompson?

A Yes.

Q Would you kindly read the last paragraph of that memorandum.

A "~~The~~ This situation is somewhat offbeat for the Pension Fund, but I think that it is quite interesting. The company has the ability to adjust its cost structure rapidly to changing market conditions and appears to be a better credit risk than would be thought for the toy industry. Moreover, management has been uniformly impressive and the basic business appears to be in an uptrend which ~~would~~ could prevail for some time. On this basis we believe that the risk/reward relationship is favorable and that the Pension Fund could invest $3 million in the convertible debenture without undue exposure."

Q Mr. Thompson, at any time prior to the private placement did you review the agreement between Topper and First National City Bank as agent for the other lending banks?

A No.

Q Did you ever ask to see it?

A Before the private placement?

Q Yes.

A No.

Q Before the private placement, did you ever review the agreement between Ford Motor Credit Company and Topper?

A I think we saw a letter of intent, which the company supplied to us, but we never saw the agreement.

Q Mr. Thompson, I will hand you what has been marked as Plaintiffs' Exhibit 1243 and ask you if that is the letter of intent that you just referred to.

A Yes.

Q Did you attend the closing on the purchase of the Topper notes in September 1971?

A Yes.

Q Who was there?

A I don't remember, to be honest with you.

Q Tell me who you remember was there.

A I believe Inglis was there. Orenstein was there. Tom Ramseur was there. Joe ~~Hensey~~ Hinsey was there. That is what I remember. I mean, there were other people there, but at this point in time I don't remember who they were.

Q Where was the closing held?

A In White & Case's offices.

Q Who was Tom Ramseur?

A Ramseur.

Q R-a-m-s-e-u-r?

A Yes. He acted on our behalf -- he acted on behalf of the purchasers of the Private Placement in writing up the purchase agreement.

Q He is a partner of White & Case?

A Yes.

Q Who is Joseph ~~Hensey~~ Hinsey?

A He represented Topper as Topper's general counsel.

Q Is he a partner of White & Case?

A I believe he is.

Q Do you recall a provision contained in the Private Placement agreement which said "the copies which the company has furnished you, the company's charter, by-laws and loan agreements, are complete and accurate and

include all amendments thereto"?

A No, I really don't recall that.

Q Did you read the Private Placement agreement?

A You are talking about the purchase agreement?

Q Yes.

A Yes.

Q You don't recall that provision?

A I just don't remember it now.

Q Did you read any of the other papers delivered at the closing?

A I don't even remember what other papers were delivered at the closing, if any.

Q Without remembering what they were, do you remember whether or not you read any?

A I can't say. No, I don't remember reading any now. I don't know what we are talking about.

Q We are talking about reading any of the papers which were delivered at the closing on your purchase of $3 million of Topper notes in September 1971 and I was simply asking you whether you remember reading any papers.

A My problem is, I don't remember any papers, you know, being given to me. I am not really clear what you are asking me. If there were papers given to me, I certainly would have looked at them.

am

Q Do you recall the figure given for Topper's net sales for the six months ended June 30, 1971 in the Examples of Company Reporting?

A I believe it was something over $19 million.

Q Do you recall the figure given for Topper's projected sales for the year 1971?

A Well, the projection was something between $68 million and $72 million, depending on who you talk to.

Q During your August 13 meeting, when you were looking at the Examples of Company Reporting, did you go over it page by page?

A No, we did not.

Q Do you recall which pages you looked at as you sit here today?

A No.

Q Do you recall any pages in the Examples of Company Reporting of customer contract listings?

A No.

Q Do you recall any pages of aging reports?

A Well, we looked at the accounts receivable report which had an aging breakdown in it, but we didn't think of it this way; we thought of it as the financial vice president coming in and explaining a system of controls to us, rather than sitting down and adding up

numbers on a sheet. We wanted to make sure that they had a management information system, a system for controlling inventories to make sure that they did not get ~~to~~ too many parts in ahead of time for a toy that they might not want to continue making and then there was the aging of receivables and the cash flow part of it.

But there were a lot of reports that were just mentioned in here in passing, as we got them, and they provided us with their input , but we didn't sit down and look at the numbers of them.

Q Apart from the numbers, did you look at the categories or columns on any of these reports?

A My recollection is ~~Harris~~ Harrison and I were sitting on one side of the table with this booklet in front of us and we were asking Rose questions on their controls and Rose would reply and say, "Look at such and such entry here," or else Rose would say, "Now, I want you to look at this particular item," and explain the purpose of it. And that was the context of it in which we reviewed this booklet.

Q How long did your meeting on August 13th last?

A I believe it lasted approximately two hours.

Q Did you keep a copy of the Examples of Company Reporting after the meeting?

A Oh, yes.

Q Did you take them home and look at them that night?

A It was a Friday and I looked at them that weekend.

Q When you looked at them at the weekend do you recall looking at the pages having to do with the aging report?

A Yes, I read that accounts receivables analysis. and I think there was another one in there on inventory of parts. I read the text of it. We looked at the accounts receivable figures closer than we did some of the others, and we looked, I think, at stock parts.

THE COURT: You are talking over the weekend? Were you with Mr. ~~Herring~~ HARRISON?

THE WITNESS: No, I am sorry. I was really thinking of the meeting. On the weekend part of it, what I did do was read through the text that was accompanying this and then look at the exhibits, because we really had not sat down and had a chance to go over this in detail.

In other words, we didn't know what the form of it would be that Rose would take in showing us his control system when he came in, and it was really a discussion, and there was no chance to sit down leisurely and look at the

booklet in a logical manner.

Q Mr. Thompson, do you have Plaintiffs' Exhibit 1459 in front of you?

MR. WOLLEN: Your Honor, not all the pages are numbered, unfortunately, and it is difficult to direct the witnesses attention to it.

Q I show you this page, Mr. Thompson, will you read that entire page?

A It is entitled Accounts Receivable Report:

"The company's accounts receivable records are maintained on the IBM computer. Prior to three years ago, these records were maintained on an NCR bookkeeping machine system which made it extremely difficult to:

"1. Follow up on collection of open invoices;

"2. Follow up on collection of improper customer deductions;

"3. Accurately project cash receipts.

"For the past three years, the company's accounts receivables have been maintained on the computer with the resulted aging of accounts receivable can be prepared quickly after the end of the month, both in summary form by account and in detail for follow up on collection of open invoices and deductions. In addition, the projection of cash receipts is prepared monthly by the computer indicating

anticipated receipts by week."

Q Do you recall, Mr. Thompson, during your meeting on August 13th reviewing other pages contained in the Examples of Company Reporting having to do with credits issued by Topper?

A I don't remember that.

Q Do you recall reviewing those pages over the weekend when you said you looked at it again?

A I am sure I read the text of everything in the booklet, so I would have seen it over the weekend.

Q Over the weekend you did not look at the figures or columns on the other sheets?

A Well, I looked at it, but I did not try to draw any kind of conclusion or infer from them. To put it in perspective, when I was out at Topper, Rose's office was surrounded by mounds of paper. Some of these things were 700 pages long, an individual report that came out weekly. Others of them were 300 plus pages long, and one of the reasons I did not sit down and discuss it with him then was that it would have taken somebody, you know, a day or a week to actually draw any conclusion or even examine this material,and this was his attempt to show us a system which would cover the mechanical problems of running a business, and then with specific reference to

controlling inventories and accounts receivable and collections.

Q Do you recall during your mee ng on August 13th discussing any of the pages in the Examples of Company's Reporting having to do with returns?

A The point on returns was that the company had a good mechanical device for recording them accurately, and this was put in the same context of a good mechanical device for making sure that shipments were coordinated with billings. In the financial statements the return figure was like half a million dollars on a company that was doing $21 million gross.

So at that time it did not seem all that important.

Q You never asked to see the detailed reports?

A No, I did not. You are talking about the detailed accounts receivable mentioned in this?

A No, I never asked to see that.

Q What did Downs tell you on August 13th about eligible receivables?

A Well, this is a luncheon that followed immediately after the meeting in our conference room. He told me that eligible receivables were those that were less than 60 days overdue and that receivables were really the

main basis that the bank was lending against, what they looked for as their good collectible collateral.

Q Did you ask him what he meant by "eligible receivables"?

A Yes, I did.

Q And the answer he gave you was what you just described?

A Exactly.

Q Did you ask him what receivables were ineligible?

A No, I didn't.

Q Did you ask Mr. Downs what categories of receivables were ineligible?

A No, I did not.

THE COURT: Anything that was not eligible was ineligible?

THE WITNESS: I was interested in what the good stuff was; I didn't care what the other stuff was.

Q Did you ask him the amount of ineligible receivables?

A No.

Q You knew, did you not, that the lending banks had as collateral inelgible as well as eligible receivables?

A The way it was put to me was the banks had everything; they had the machinery, the molds, the dies,

the inventories; they put their money into the company that was the lifeblood of Topper, and in return for which they got everything of value. But what they really considered the basis of lending were these eligible receivables, receivables from people like Sears Roeback, and J.C. Penney, where they knew there was no question they would get paid in time.

Q Do you remember testifying yesterday, Mr. Thompson, about having had lunch with Mr. Nelson?

A No.

Q This was some time ~~during~~ during the period August 16-August 23, somewhere in there?

A Right.

Q Isn't it a fact, Mr. Thompson, that you told Mr. Nelson during this lunch that you wanted the Pension Fund to participate in the Private Placement?

A No, absolutely not.

Q Isn't it a fact, Mr. Thompson, that during this lunch you asked Mr. Nelson how you should approach Harvey Mole in order to get his approval of the Private Placement?

A Well, not as you stated it. There were two things going on here:

One, to review what had been done. In other words, Mr. Nelson was the man who had done most of

these private placements over the years and the one who had really done those that we made hundreds of millions of dollars in aggregate over the years.

THE COURT: Mr. Nelson is Mr. Mole's predecessor?

THE WITNESS: He had worked under Mr. Mole as a vice president. He retired and ~~stated~~ stayed on as a consultant.

THE COURT: He is your predecessor?

THE WITNESS: Well, I worked very closely with him and under him, really.

I reported to Mole, but Nelson was really in between us, and Nelson was, in my opinion, a very smart investment man.

So I would go to him and talk things out and say, "Does this fit in with the policy of the Pension Fund? What do you think about it?"

I did that with just about every investment along here. So I wanted to get his advice in a company that was in an industry thatwe had not had any experience with which was noted as being above average in risk as to whether I had done a complete and thorough investigation.

The other thing was and that I knew when Mr. Mole came back from vacation the Topper people, who had already lined up a tentative meeting, were going to

be into us to get an opinion very quickly, and I didn't want to hold up giving them an opinion. One of the things that we try not to do is to keep a management hanging out in the wings.

If we are going to say no, we say no. So I wanted to know what would Mr. Mole want me to do in the way of additional work that would let him give a quick reaction and, really, the two things that remained to be done, let us meet these guys face to face and, second, check out the current financial condition of the company, and the way to do that was through First National City Bank.

Q You are clear that you did not tell Mr. Nelson during this luncheon that you wanted to do the deal?

A Well, we had not made up our mind at that point.

THE COURT: In this conversation with Mr. Nelson did anything come up between you about the problem of whether these goods were returnable or not?

THE WITNESS: No. Excuse me. I know we talked about Glover Johnson in here, and I really don't know whether I told him that Glover Johnson had said this practice of selling on consignment had been ended or not. But it would have been really an affirmative statement on my part that there was no longer a problem.

But the thing is at the time I did the work on Topper, you know, the consignment problem had occurred years ago, and we would not have made that big a deal of it. But we wanted to be sure it had ended.

THE COURT: We are all troubled by this 20-20 hindsight, but it seems incredible to me that you should not have been concerned about that in the toy industry, especially when you had this conversation about how mad everybody was at Mattel and everybody seemed to be happier with Topper.

Why were they so happy with Topper? They were happy with Topper because Topper took back everything they wanted to send back. You could have found that out by questioning.

Q I take it, Mr. Thompson, you were during this entire period of time receiving telephone calls from people at Topper?

A Yes.

Q Urging you to come to a conclusion?

A They were interested in keeping us posted, and Hayden Stone was really the one trying to lay out the format to have an orderly closing, but they wanted the deal done as quickly as could be done, and that is characteristic of every deal you ever work on, whether it is a AAA credit

or a Topper Corporation, they want the money before the stock goes double and the company does not want to sell it, or before it goes down and the public does not want to buy it.

Q So you were getting calls from both Topper and Hayden Stone?

A Yes.

Q Mr. Thompson, do you have in front of you Plaintiffs' Exhibit 1379? This is your memorandum of August 30, 1971.

A Yes.

MR.WOLLEN: Would it burden the record too much' It is not terribly long. It is a memorandum and a rather crucial memorandum? I would like Mr. Thompson to read the entire memorandum into the record.

THE COURT: 1379?

THE WITNESS: It is a memorandum to Mr. ~~Moley~~ Mole, dated August 30, 1971, regarding Topper Corporation:

"Mr. Waldman, a First National City Bank loan officer, who handles the Topper account, called me at the request of Walter Jaffers on Friday. He indicated that FNCB has a 40% participation in a banking line with Topper in which it lends up to 80% of eligible accounts receivable. He did not know the current amount of the loan but thought

it to be several ~~million~~ millions dollars.

"Mr. Waldman indicated that the bank is lending at 3% over its prime rate without any compensating balances so that it is currently providing funds at 9 percent to Topper. I asked him why the Ford Credit rate is so high and he said that several years ago, Ford Credit gave its money away but that this policy has changed 180° in the past few years. In his opinion, the 14% maximum rate is high but not out of line, and he feel that longer term money in this situation deserves a significant premium over normal commercial banking rates.

"FNCB, as part of its lending functions, performs audits of Topper and Mr. Waldman said that this is one of the reasons that his bank does not lend at a lower rate. Management has shown ~~itself~~ itself to be competent and to have good controls in these audits. The bank rates Topper above-average with respect to the other toy companies with whom it deals and Mr. Waldman believes Jack Rose of Topper to be a very competent financial officer. The relationship between FNCB and Topper has been good and there are no problems at the moment nor does Mr. Waldman anticipate any.

"FNCB believes Mr. Orenstein to be extremely important on the marketing side of the business, but indicated

that the company has done an excellent job of estimating cost of production for new toys. Mr. Waldman was aware that most of Topper's new items were developed by others than Mr. Orenstein and believes it is lessening its dependence upon him.

"On balance, the bank thinks well of the company and that it rates highly among the managements of companies in the toy business. On the other hand, Mr. Waldman was unwilling to commit himself outright as to whether the toy business is one in which we should commit funds and, in fact, ducked this part of my inquiry."

And it is signed Henry L. Thompson.

Did you dictate this memorandum or write it out in longhand?

A I dictated it immediately after the conversation with Mr. Waldman on that Friday, August 27th, with the notes in front of you.

Q Do you recall, Mr. Thompson, testifying yesterday about a meeting with Topper people on September 1, 1971?

A Yes.

Q Who was present at that meeting?

A Mr. Mole and I, and Downs, Rose and Orenstein of Topper, and Inglis of Hayden Stone.

Q This was the meeting for the Topper people

to meet Mr. Mole?

A Right.

Q I think you testified yesterday that you discussed the success of the Dawn program at that meeting?

A Yes.

Q I think you testified you discussed the abandonment of Topper's consignment selling practice?

A Yes. To put this in context, this is the first time Mr. Mole had met these people and had this pile of memoranda, and in one of them it mentioned that that practice had been over, and he asked the questions for himself. This was a chance to put his years of experience and his judgment on this, and to go over the same ground I did or ask other questions.

One of the things he asked about was to insure that this problem was ended, and I think it was because it came up in the Glover Johnson memo, and Mr. Johnson was a person that he particularly directed me to while he was away.

Q In fact, this memo was a sort of wrap-up of a lot of your prior investigation for Mr. Mole? This meeting was a wrap-up of a lot of what you had previously done in your investigation?

A No. You see, I did it at my level and I laid

it out as completely as I could. This was a chance for Mr. Mole to come in at his level and to really ask any questions from a different prospective than, let's say, a person more involved in the detail of this, but with a greater investment judgment and a broader perspective.

Q At this meeting on September 1, 1971, did Mr. Downs say that Manufacturers Hanover had a favorable opinion of Topper?

A Yes, but this was sort of an aside.

Q Just yes or no.

A Yes:

THE COURT: Downs was the man who used to work for Manufacturers Hanover?

MR. WOLLEN: An executive vice president of Topper.

THE WITNESS: Right. In other words, that was the impression, but I can't say it was a direct quote.

Q Downs was a friend of yours, apart from being a business contact?

A He was a social acquaintance. He was a man who went to the same summer community that my in-laws had a house, and I would see him at cocktail parties occasionally.

Q How long had you known him prior to September,

1971, approximately?

A I really can't answer the question.

Q One year? Ten years? Twenty years?

A Well, over one year, and I would say under ten.

Q Didn't Mr.Downs on September 1st tell you specifically that Topper was trying to go unsecured?

A Well, he told me that, and I am not sure whether it was September 1st or whether it was at the August 13th meeting.

Q He told you both times, didn't he?

A He may very well have.

Q As a result of your discussion at the September 1st meeting, Mr. Thompson, isn't it a fact that you were not even sure that Topper intended to stay with First National City Bank?

A I thought they intended to stay at least until late in 1971, but that they were interested in, you know, getting out from what I call a factoring agreement, which is really this pledging of receivables, and going unsecured, and whether this was with a different part of Citibank or whether it was with Manufacturers, which would have been the logical alternative, I didn't know at the time. But they brought the Ford Credit 7 million in as a clean up for the banks at the end of the year, and then for Ford

to go unsecured they had to get $5 million in a private placement, and that was the purpose of our private placement. So they wanted to get out from under the arrangement that they had with the secured section of Citibank.

Q Had anybody ever told you whether Topper wanted to get out of First National City Bank whether they went unsecured or not?

A No. The reference was to go unsecured and not to whether they stayed with Citibank or not.

Q Mr. Thompson, do you have in front of you Plaintiffs' Exhibit 1370?

A Yes.

Q Which is your decision memorandum?

A Right.

Q Will you kindly read the last paragraph of the memorandum?

A "Our retail trade and banking checks have been favorable and this issue provides us the opportunity to obtain an interesting, though admittedly offbeat, participation in a seemingly well-managed company in a growing phase of the economy. Accordingly, it is recommended that we purchase $3.0 million of the Topper convertible debentures in view of the high expected payoff, if the company is successful in quadrupling earnings per share in

the next four years and increasing stability of the toy industry and of Topper, in particular."

Q In that paragraph you refer to trade checks. Isn't it correct that is as to discussions you had with gentlemen at J.C. Penney and Zayre?

A Yes.

Q And your reference to banking checks refers to the conversations you had with Mr. Waldman and the reference that Mr. Downs made to Manufacturers Hanover?

A Yes.

Q Did Mr. Mole make any changes in the draft of the decision memorandum?

A I don't recall any.

Q Did you show him a draft?

A No. That is not the way it works. You give him a final one, and if he wants to change it, he changes it, and it is typed over in final form.

Q Do you remember testifying yesterday, Mr. Thompson, about a discussion with Mr. Inglis, in which you mentioned to him your contact with First National City Bank?

A Yes.

Q My notes indicate your testimony yesterday was that that conversation occurred a few days after

August 30th, and then you said between August 30th and the end of that week. Can you give us your best recollection of when that conversation occurred?

A Well, it was obviously on August 30th -- I mean, it was after Friday, the 27th. My recollection is just before or just after the writing of this decision memorandum.

Q When did you write the decision memorandum?

A I believe I started to write it either the afternoon of September 1st or on the morning of September 2nd -- within a few days either way. Obviously, you got the 27th, and then you got the memorandum being written on September 2nd, so it would be in that interval or within a few days.

Q Do you recall testifying at your deposition that the phone call took place "a few days after the September 1st meeting of the Topper people"?

A If you say it, I must have said it.

Q I asked you, do you have a recollection of it?

THE COURT: He obviously does not remember what he said in a deposition some years ago. People can't possibly remember what they said in a deposition years ago.

Q Assuming, Mr. Thompson, you said it in a deposition, does that help you any more now to fix when the conversation occurred?

A No, I think it is more precise now than it was then.

Q Your recollection is more precise now?

A Well, the time reference. I know it was about the time that I did this September 2nd memo and it had to be after the Waldman conversation.

Q Assume at your deposition you said that the telephone conversation occurred the day you prepared the memo to the committee on finance dated September 2nd, or within a few days afterwards, does that help you any more in fixing the time when you had that conversation?

A It really does not. I remember the meetings much closer than I remember the times of these telephone conversations.

Q You knew, Mr. Thompson, in August and September of 1971 that the proposed Ford loan was to be secured?

A Yes.

Q Along with the bank loans, by all of Topper's assets?

A I really have never seen the Ford agreement, and my understanding of it is that letter of intent, and I am really not that familiar with it.

Q You knew the Ford loan was to be at an interest rate of 14 percent?

A I think that was the maximum interest rate.

THE COURT: I don't know how relevant it is, but why did Topperwant to pay more to Ford in interest than to the bank?

THE WITNESS: Your Honor, I really don't know what the bank rate was, because they had this side agreement there in which they were, in effect, lending them money, but never letting them take it out of the bank, and I think that was about 20 percent of the total, and if it was, let's say, 7 percent, you would add 1.4 percent to the 9.1, and you get it up to 10-1/2, and you didn't know what other fees they had. So it was probably at least 10-1/2 percent.

Q Mr. Thompson, I will show you documents which have been marked Citibank's 58 and 59 and ask you if you recognize them.

THE COURT: What is the date?

MR. WOLLEN: September 27th and 28th, 1971.

A Yes, I have seen them before.

Q Can you tell me what they are? Are these the letters which authorize MOrgan Guaranty to make the payment on behalf of the Pension Fund for the Topper notes?

A Yes.

Q By the way, Mr. Thompson, do you know if the Pension Fund has an agreement with Morgan Guaranty similar to the agreement it had with Citibank?

A Well, I do know. I had never seen these agreements prior to the Private Placement, but it was my understanding that these two banks were in the same relationship.

Q You never saw the Morgan Guaranty agreement prior to the Private Placement?

A No, I never saw either of them.

THE COURT: They had a custodial agreement, similar to Citibank?

THE WITNESS: I have seen them after, and I think they are almost identical.

THE COURT: Before the fact, you had just a general impression that they were both there available to you?

THE WITNESS: Right, that these were special accounts, but I had never seen any documentation of it.

THE COURT: I am just trying to get my own view. Whatever you thought about the relationship between your company and Citibank, you thought the same thing about your relationship with Guaranty?

THE WITNESS: Yes.

Q Prior to the private placement?

A Until we dropped Citibank.

Q When did you drop Citibank?

A Not too long ago; within the last year.

Q The end of 1975?

A That is about right.

Q Did there come a time, Mr. Thompson, when you received Topper's September 30, 1971, financial statements?

A Yes.

Q Ending September 30, 1971?

A Yes.

Q When was that?

A I think it was probably October, 1971.

Q Did you review those financial statements?

A I did not really review them; I read the text accompanying it and really sent it on to the file. No would be the answer.

Q You read the text, but not the numbers?

A Well, I looked at the numbers and the text said these were going to be record earnings and record sales, and you know, what I was ~~waiting~~ waiting for was the year-end statement, which would be audited and which would give the full picture.

THE COURT: I am sorry, what was the date

of that?

MR. WOLLEN: The financial statements for Topper, nine months ending September 30, 1971, which Mr. Thompson had testified he received some time in October, 1971.

THE WITNESS: Yes. In other words, I read it, but when you say review, that would imply, you know, doing a more thorough analysis than I did. I just simply read it and sent it to the file.

Q Whatever analysis you did of it, isn't it a fact that after reading the financial statements you considered that they showed a soundly financed company with improving earnings?

A I think I made that statement some place along here.

MR. WOLLEN: Your Honor, I am looking for some papers.

THE COURT: Suppose we take a recess.

(Recess.)

BY MR. WOLLEN:

Q Mr. Thompson, do you know an Al Botte?

A Excuse me, I couldn't hear the question.

Q Do you know a gentleman by the name of Al Botte?

A I believe he is an accountant with Arthur Young. I spoke to him once. I don't know him.

Q You did speak with him once?

A Right.

Q Concerning Topper?

A Right.

Q He was an accountant at Arthur Young who had some responsibility for the Topper audit.

A Well, yes.

Q Mr. Thompson, I will show you a document that has been marked Citibank Exhibit 121 and ask you if this is a memorandum of your one conversation with Mr. Botte.

THE COURT: Do I have that?

MR. WOLLEN: Yes, Citibank Exhibit 121, I think.

THE WITNESS: My copy isn't marked.

I'm sorry, yes, 121 Citibank Exhibit.

MR. WOLLEN: That was among the exhibits which we introduced this morning, your Honor.

A The answer is yes.

Q Mr. Thompson, somewhere in the middle of the second paragraph there is a little mark that to me looks like a paragraph sign. It is very faint, but it is there. Do you see that?

A Yes, I do.

Q Would you read the memorandum from its beginning to that mark.

A "I asked him about the legitimacy of sales and he said that his firm had asked Topper on many occasions whether there were any return obligations and that the answer was always no. Interestingly, in connection with the shipment of goods from the Far East, he said that White & Case had given an opinion stating that Topper sales of these items were final. Mr. Botte recognizes the dilemma of reconciling the finality of sales with return policy in view of last year's heavy returns, but was unable to reconcile this. In his opinion, Topper's problem is that it completely misjudged the market for its toys last year and overstocked distributors. He claims that Arthur Young had no prior knowledge of this and, in fact, was not active in working with the company since last spring. Moreover, he used the word never on three occasions in saying that his firm had not spoken to any of the bank group and specifically had not spoken to FNCB."

THE COURT: What is the date of this memorandum?

THE WITNESS: February 2, 1972, your Honor.

Q Mr. Thompson, I will hand you two documents, which have been marked Plaintiffs' Exhibits 1398 and 1383. Do you remember counsel for the plaintiffs, Mr. Bicks, reading from parts of Exhibit 1398 yesterday?

A I remember we referred to this document, I don't know which parts were read.

Q Would you kindly read into the record the third paragraph of that memorandum?

A "Mr. Rose said that he had reviewed the problem of collections not being up to expectations with Mr. Orenstein and Mr. Pierce and they told him that the company would do about 72 million in sales for 1971 at an August meeting. Prior to our closing and in preparation for the company's nine months financial statement, Mr. Rose again reviewed sales and this time went over the company's business item by item and customer by customer. Once again management seems to have convinced itself that there was no overstocking of inventory in the field and that they could do $71-$72 million of revenues this year."

THE COURT: What is the date of this memorandum?

THE WITNESS: December 22, 1971.

coas4 Thompson - cross

Q Would you also, please, Mr. Thompson, read the last paragraph of that memorandum?

A "It is impossible to appraise our status until we see numbers which are indicative of Topper's balance sheet position and its loss. We will be contacted either by Mr. Downs or Mr. Rose," and there is a word in there I can't read, "and then should have a better feel of whether or not the company will survive. I am shocked that Arthur Young auditors and C.B.W.L. would make no mention of the company's selling practices or returns in the financial statement or prospectus, but had I known more about the toy business I would have been alert to explore this area further. It does not seem that we can do more at this time and we still have some chance of salvaging our investment unless the situation is even worse than it appears to be at this time."

Q The reference to C.B.W.L. is a predecessor entity of Hayden Stone?

A The same firm that we have been talking about.

Q Would you take a look, Mr. Thompson, at Plaintiffs' Exhibit 1383. I just handed it to you.

A I have it.

Q Is this a memorandum that you made of a telephone conversation with David Downs?

A Yes.

Q Would you kindly read this, please?

THE COURT: What is the date?

MR. WOLLEN: January 4, 1972.

A "I called David Downs after the FNCB meeting to try to determine whether or not the bank had put pressure on Topper to obtain additional money. Mr. Downs indicated that it was C.B.W.L. late in 1970 that had requested additional longer term financing and that it was its idea to sell equity in the spring of 1971. The offering was filed in mid-February and Mr. Downs says that it is completely coincidental that the collections from the spring merchandising program were due on May 5th with the remainder coming due on August 5th. He said that FNCB had been a 'thorn in his people's sides' and that FNCB literally did not know of the Ford financing until after it was arranged. He said that Topper was bringing in the Ford money to go unsecured and planned to drop the FNCB factoring group. He had had discussions with Manufacturers Hanover concerning taking up the slack if FNCB got wind of this and dropped out of the financing group."

Q Do you remember your testimony yesterday, Mr. Thompson, about discussions in January of 1972 with

Mr. Rose about what information the First National City Bank had in July and August and September of 1971?

A Yes.

Q The Mr. Rose that you had those discussions with was the same Mr. Rose with whom you had meetings in August and September concerning the Private Placement?

A Yes.

Q He was the head financial officer of Topper?

A Yes.

Q Did you ever say to him, Jack, why didn't you tell me?

A No. I was using --

Q Did you ask him that?

A I did not.

Q How much time did you spend on investigating the Private Placement?

A I have to give you a very broad approximation of that and I was asked this in an interrogatory and the best number I could come up with was about 40 to 50 hours.

Q Would you be surprised if the answer to defendants' request to admit said 60 to 80 hours?

A How much goes on in your mind while you are thinking about it but not in meetings or reading documents?

Q Perhaps this will help you, Mr. Thompson,

if I read from it. "60 to 80 hours not including time spent analyzing the investment apart from the preparation or review of documents and in certain telephone conversations the duration of which cannot be estimated."

A Let me put it this way: It was the principal thing that I did during the month of August 1971. 40 times 4 and a fraction, maybe 170 hours, you don't work on this thing all of the time, but --

Q That is your best guess?

A It is a guess.

Q A reasonable guess?

A Maybe not the best guess, but not an unreasonable guess.

Q Your telephone conversation with Mr. Waldman on August 27 was ten or fifteen minutes?

A No, it was fifteen minutes or maybe a few minutes longer.

MR. WOLLEN: Thank you. No further questions, your Honor.

MR. BICKS: I have nothing, your Honor.

THE COURT: All right, you may step down.

(Witness excused)

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AFTERNOON SESSION

2:30 p.m.

L E O N A R D C. H I E R O N Y M U S, called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

MR. BICKS: Your Honor, following the same procedure that seems to have worked moderately well with other witnesses, I would like to offer in evidence at this point all the documents that the witness will be shown.

THE COURT: Right.

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DIRECT EXAMINATION

BY MR. BICKS:

Q Mr. Hieronymus, please state your educational background briefly, if you will.

A Graduated from high school in Holland Park, New Jersey in 1959, graduated from Rugers University in 1963 with a B.A., and I graduated from New York University M.B.A. program in 1971.

Q June of '71?

A That's correct.

Q What was your first employment following your graudation from NYU?

A Connecticut Mutual.

Q When did you start work at Connecticut Mutual?

A June 1, 1971.

Q What were your responsibilities at Connecticut Mutual at June 1, 1971, when you commenced work?

A I was a security analyst for the company and was charged with reviewing various loan proposals and presenting them to Mr. Gaylord Weir, who was my immediate supervisor.

Q What was Mr. Weir's title at that point?

A Mr. Weir's title was vice president - securities.

Q Just to skip ahead, when did Mr. Weir retire?

A Mr. Weir was asked to retire on January 19. He has not been in work since early November and presently is incapacitated.

Q Back in June '71 when you reported to work, how did your responsibilities as an investment analyst relate to Mr. Weir's duties, what did you do and what did he do?

A I was charged with the responsibility of receiving a new loan proposal, setting up the figures on the new loan proposal in a format which we would then be able to analyze various ratios, such as the fixed charge coverage, an indication of the leverage of the company by setting up figures on the capitalization, including bank

loans, funded debt and stockholders equity.

In addition to reporting or making up this material, I also made reports, memoranda, to give to Mr. Weir in support of whether or not we should do a loan proposal.

Our working relationship with him, I was in constant daily contact. We did do quite a bit of informal talking back and forth as a deal progressed along to indicate, for example, who might be participating in a deal and just how it might be proceeding.

Q I think that was very useful background. You reported both in writing and in person then?

A Yes, I did.

Q In those beginning months when you were there would you say that you reported more one way than the other?

A Depending on the assignment, there was considerable verbal reporting in concert with the subject and the amount of information that needed to be sent to him. Mr. Weir did favor a personal approach and have an open door policy to his office in order to facilitate communicating material quickly and not being burdened with an awful lot of writing.

Q Did there come a time soon after you reported to Connecticut Mutual when a proposed private placement

in Topper notes came to your attention?

A Yes, it did. It was about the middle of July.

Q You had been on board about six weeks then?

A That's correct.

Q Could you describe the circumstances under which you first heard of the proposed private placement?

A Mr. Weir invited me into his office and said the he had received a private placement offering from Hayden Stone through a contact that he had worked with before, Jay Inglis, and would I not take this particular proposal and read it over and set up the figures to see if this was something that we could be interested in.

Q When you say he had received a private placement proposal are you referring to what we have come to call as the private placement memorandum?

A Yes, I am.

MR. BICKS: Your Honor, that is one of the first documents. If you don't object, I assume it's all right by you, I assume we don't have to introduce each copy in evidence.

THE COURT: That's right. As a matter of fact, the witness referred to his copy the last time.

MR. BICKS: That's right. The point is we are not introducing each one.

Q You indicated Mr. Weir told you to look into it and prepare your standard summary sheets.

A Yes.

Q What were the materials that you prepared for Mr. Wear following your review of the memorandum?

A I prepared in the summary sheet a listing of the sales, the various income, selected income titles, such as the availability of fixed charges, interest charges, net income, earnings per share; on the balance sheet would be such items as net working capital, the capitalization, including the debt and shareholders' equity. Along with writing down this information we will also calculate the amount of funded debt to total capitalization in order to put into a standard format, in which we could analyze how this compared with a lot of other deals that we had been working on.

Q By standard format, you mean a format typically used in Connecticut Mutual?

A That is correct.

Q In preparing these materials did you rely upon any information in addition to that reflected in the Private Placement Memorandum with its attached prospectus?

A I did want some additional information. I asked Mr. Inglis, of Hayden Stone, to forward to me the latest financial statements on Topper, so as to have the most complete up to date information as possible.

In addition, I asked for a listing of the ten

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largest customers of Topper.

Q You have before you, Mr. Hieronymus, a document in evidence marked as Plaintiffs' Exhibit 1420, and then a document marked Plaintiffs' Exhibit 1460. I ask first about Plaintiffs' Exhibit 1420, a copy of a letter of Mr. Inglis written to you during the date August 9, 1971, enclosing the six months unaudited financials of Topper.

MR. LILLIE: You said Mr. Inglis; I think it is Mr. Rose.

MR. BICKS: Excuse me.

Q -- Mr. Rose wrote enclosing the six months unaudited financials of Topper enlisting the Topper ten principal customers?

A Yes.

Q Prior to the time you received this letter had you ever talked to Mr. Rose?

A No, I had not.

Q Had your request for the latest figures in the ten largest customers in fact been addressed to Mr. Inglis?

A Yes, it was.

Q In your first conversation with Mr. Inglis did you do any more than ask him for the latest financials plus a list of the ten principal customers?

mmbr 3 Hieronymus-direct

A I beg your pardon?

Q I say, in your first conversation with Mr. Inglis did you do any more than ask him for the unaudited six month figures plus the ten largest customers?

A Not that I presently can recall, no.

Q Following your receipt of these materials from Mr. Rose what did you do next with regard to Topper?

A I don't know whether I had those in hand by the time I went back to Mr. Weir to discuss what I had gotten in my preliminary analysis of the company, to talk over with him the spread ~~sheets~~ sheets 2 that I had developed and the capitalization, and also to give him a description of the notes involved, a brief review of what the company did, and to discuss with him some of the points that I thought were important, an indication that there was an increase here in the sales over the last couple of years, that the new products that the company had introduced in 1971 had been well received, that the company had received a contract from Sesame Street -- these were all favorable factors that looked like the company was gaining momentum and was something that we might be interested in at this point.

Q Were there any unfavorable factors in this first discussion with Mr. ~~Mear~~ Weir 2 following your preparation

of the summary sheet?

A I don't recall our particular discussion of the unfavorable factors at this particular point, no.

Q Now, how was it left after you reviewed your summary sheets with Mr. Weir?

A We thought, Mr. Weir thought,that this was a situation that we might pursue and to go ahead and keep our foot in the door.

Q What do you mean by "keep your foot in the door"?

A It was a situation that looked like it had some merits to it; it would need further investigation in order to make a complete decision on it.

It was during this period we found out additional information as to how the deal was progressing, and that there were other interested parties that had visited the company.

Q Who told you that?

A Mr. Inglis called up to update us as to how the deal was progressing, and he indicated that a fund --

Q Did he indicate what fund?

A No, a fund. He didn't specify any particular fund, except he said a major fund had investigated the company, had gone down there, that theywere very impressed

with what they saw, with the products, with the management, and one of the ways in order to appreciate this company was actually to make a visit.

Q Did he suggest you go visit the company?

A Yes.

Q By "he," I mean Mr. Inglis?

A Yes, that is correct.

Q And about when did he suggest that? Do you recall?

A I cannot specifically say. Between the time we got the deal and August 11th, when we actually went.

Q Did you, in fact, visit the company, as he indicated you should?

A Yes, we did -- I did. I was the only one. Both of us were invited, but Mr. Weir ended up not going.

Q What date did you visit the company?

A On August 11th.

Q August 11, 1971?

A Yes.

Q Will you start from the beginning of that day and tell us what you did? What questions you asked? What answers you got?

A We started that day at the company's showroom in New York City at about 9:45, 10 o'clock.

At the showroom I was met by Mr. Inglis, Mr. Orenstein and Mr. Downs, David Downs. I don't quite know his title there. In ~~teh~~ the showroom we proceeded to go around to the various exhibits, starting out with the Dawn dolls and explaining the expanded line that the company had put in that year, that Dawn was doing very well, with $30 million sales already in hand, and that with the orders that they had received it looked like the $68 million that they had projected in sales for 1971 was going to be exceeded.

And Henry Orenstein said at this point in time of the year he had never been wrong in his analysis of the projections.

Upon looking at the Dawn dolls, we also went through the other exhibits, such as the Ding-A-Lings, the Johnny Lightning, Susie Homemaker, and last of all, went into the Sesame Street products area that still had not been ~~completed~~ completely set up. Mr. Orenstein said that new orders had been well received in this area. He was talking primarily about the Muppets. He also had several other products that had already been approved and would soon be on the market, that these items were very favorable to the company and that these products would sell on a year-round basis and have an educational benefit and would

give stability to the company.

THE COURT: These are the products used on the Sesame Street program?

THE WITNESS: The Muppets were characters of the particular people, like Big Bird, that were on the show, yes.

Q This is all in the showroom?

A Yes, it was.

Q Do you recall anything else that was said during your tour of the showroom?

A Not at this time, no.

Q When we refer to the showroom, you mean Topper's New York City ~~showroom~~ showroom?

A Yes.

Q About what time did you leave the showroom?

A I think it was somewheres around 11 o'clock, 11:15.

Q Where did you go from there?

A From there we went to Elizabeth, New Jersey, to visit Topper's plant.

Q How did you get from the showroom to Elizabeth, New Jersey?

A We rode in a limousine with Mr. Orenstein driving, David Downs, Mr. ~~Ingleg~~ Inglis, and myself.

Q Would you tell us what happened in the course of the ride from the showroom to the Topper facility?

A On the way out to the Topper facility I asked Mr. Orenstein some questions about how he came to own a business at one time and sell it and then re-purchase it. Mr. Inglis asked if he might relate the whole history to give me an idea of what had happened in the past.

Mr. Orenstein said that originally he was in the jobber business, selling toys to supermarkets. Wanting to expand into manufacturing, he needed additional capital and sold out to Philadelphia & Reading in order to gain this additional capital.

After several years the toy market changed, the discount stores started advertising toys as loss leaders, and the supermarket business no longer was viable.

At this time the president of Philadelphia & Reading became disenchanted with the toy business; he wanted to get out of it. And Mr. Orenstein and a group of investors put some money together, along with a major bank, and bought out the business from Philadelphia & Reading.

At this time the company was experiencing severe losses because of a lot of inventory piling up. One of the reasons that Mr. Orenstein stated was because it was a bill and hold policy that he had instituted, and that

during a bad period like this the situation ~~worsened~~ worsens and aggravates itself because the material that you originally thought was sales come back to you and is now back in inventory, which you would have to liquidate.

Q What period of time was Mr. Orenstein referring to?

A This was in the period --

MR. LILLIE: I don't like to interrupt you, but is the witness referring to an exhibit or something? I am not sure whether Mr. Bicks is marking an exhibit.

THE COURT: He is just talking about a trip in the car, as I understand it.

MR. BICKS: That is correct, your Honor.

Q You were ~~accounting~~ recounting what Orenstein was telling you. I was asking what period of time was Orenstein describing?

A This was around 1966, early 1967. I think the purchase date was somewhere in 1966 that he took over.

THE COURT: He bought it back?

THE WITNESS: He bought it back, yes.

Q Go ahead.

Q Due to the fact that he had a very bad experience with the former policy, this bill and hold, he said that all sales from now on were on a final basis

and he never wanted again to get into the situation that he had experienced before.

At this time Mr. Downs indicated that he used to work at Manufacturers Hanover and by the persuasions of Henry Orenstein and also because of the prospects of Topper, had decided to leave Manufacturers Hanover and come to work at Topper. Mr. Downs said that, "If you would like to get a feel as to how the banks felt in this situation, you should contact them." And Mr. Orenstein said that, yes, this would be a very good idea.

Q What was meant by that?

A To contact the banks to find out how they felt about them, since they had ~~livered~~ lived through this very troublesome period that I just related to you in the history here, that they would give us an idea as to how they felt about the Topper management.

Q Mr. Hieronymus, prior to Mr. Downs and Mr. Orenstein's comments with regard to the banks in the course of this car ride, had you had any discussions with Mr. ~~Englis~~ Inglis before you started the trip with regard to Topper's lending relationships?

A Yes, I did.

Q Could you tell us what that was?

A Before I went on the trip I had asked Mr. Inglis

about the possibility of the banks going unsecured if we were going to be putting in junior money in the situation.

My feeling was that in the usual case where junior money was coming in, there was an additional equity as far as the banks were concerned, and oftentimes the banks, seeing a stronger financial situation for the company, will go on an unsecured basis.

Mr. Inglis said he did not know what the answer was to that, but he would endeavor to find out.

Q Was that conversation with Mr. Inglis in person or over the phone?

A That was over the phone.

Q But it was prior to the August 11th visit to Topper?

A Yes, it was.

THE COURT: Supposing it was unsecured, how would that benefit you, just for my education.

THE WITNESS: Well, at the present time the banks were on a secured and demand basis and tying up all of the assets of the company and on a very short-term basis.

A downturn in the company's future in the event that they had a serious setback could very easily have the banks take everything and wipe us out.

THE COURT:If they were unsecured --

THE WITNESS: It is, at least, a step towards lengthening out the particular obligation.

THE COURT: That was for my education, Mr. Bicks.

MR. BICKS: I am sorry. I should have brought that out.

Q Following the car ride, you arrived at the Topper New Jersey facility, did you?

A Yes, I did.

Q About what time of the morning was that?

A I think it was about 11:45 or so, just shortly before 12.

Q What did you do when you got to the facility?

A Henry Orenstein showed me around the several areas. We went through the new product testing area where they were working on some of the Sesame Street toys, testing them for durability. We also went into a sort of like graphic art area where they were trying to make designs for promotional displays; we also talked with an individual who was costing out the company's products and ascertaining what each individual item in the manufacturing process and overhead was costing the company.

Q This is all before lunch now?

A That's right. Then we ~~went~~ went back to Henry Orenstein's office and had lunch.

Q About what time was that?

A Quarter after twelve, 12:30, something like that.

Q Did you discuss any business at lunch?

A No, there was essentially no business at lunch. I discussed some of my background. There was smalltalk as to -- I used to live down in New Jersey, so I knew ~~sometyring~~ something about it.

Q Following lunch what did you do?

A Following lunch David Downs took me on a tour of the manufacturing facilities and at that time we also met up with Peter Cassata, who was head of the manufacturing, and we watched some of the Johnny Lightning Trophycase cars being made by this injection molding process, watched some of the Ding-A-Lings coming off the assembly line, and the quality control that they were putting in to make sure that the toy was in proper working order, we talked a little bit about labor problems and securing people in order to work on this type of work.

About that time we looked at some of the other facilities, there was not too much going on there, and

returned back into the corporate area.

Q What happened when you got back to the corporate area? To whose office were you taken next?

A We then started to visit with Mr. Rose and in Mr. Rose's office --

Q Who was present in Mr. Rose's office with you?

A Mr. Inglis and Mr. Downs were present.

At that time we went into the computer room, where they had the hardware, and saw what was going on there and looked over the computers and came back out and then talked about several things as far as accounting, controls and various programs that the company had computerized.

In talking about one of the programs the company had, they had a run of orders that the company had received and had this on the computer, and we went through and looked at a -- several examples of customers that the company had, and then at the end there was a total of $53 million. I asked Mr. Rose whether these orders were good and Mr. Rose responded that Mr. Orenstein thought they were good orders and Mr. Orenstein, based upon his experience, was never wrong at this late time of the year.

Q So this was $53 million in orders as of August 11th?

A That's correct.

THE COURT: What did you mean by good order?

THE WITNESS: An order that would ultimately be shipped, that would not be cancelled or that people would reject in the future.

THE COURT: Then if you had to take Mr. Orenstein's judgment on it that would seem to imply to me that the contracts weren't final.

THE WITNESS: These were just orders, they were not yet sales or shipments of the product out.

THE COURT: Doesn't an order become a contract as soon as it's mailed out, as soon as it's accepted?

MR. BICKS: That was the purpose of his question.

THE COURT: What?

MR. BICKS: That was what he was asking. Were the orders firm, in other words.

THE COURT: Yes, but he didn't get a legal opinion, he got a judgmental opinion based on experience, which would suggest to me that they weren't legally binding but he was relying on the good faith of somebody or future events or something like that.

Q Why did you ask if the orders were good or firm or however you want to characterize it?

A Well, this was to verify in my mind that past practices were not being used again and that indeed we were in a situation here where there would turn up to be ultimate sales that would not have to be turned back into inventory if they were not sold.

Q What else did Mr. Rose say at this point on the subject of orders?

A On the subject of orders?

Q Yes, or sales.

A Oh. We then talked about when the company booked a sale and Mr. Rose said that the company booked a sale as soon as the product was shipped and that meant that there was an instantaneous sale that came about.

In future questioning about sales that had taken place in 1970, where the company had sold $14 million on an extended dating basis, I was interested in finding out whether or not that those sales that were made back then were actually collected or -- excuse me -- that the receivables were actually collected, and I asked Mr. Rose, since we were now well into August and those extended dating receivables were on a period of five to eight months, that they had been substantially collected, and Mr. Rose apparently did not hear my initial question and Mr. Inglis asked him to repeat it. Upon repeating the

question Mr. Rose said "Yes, they are substantially collected and we are not having or experiencing any delinquencies on this."

Q That question was with specific reference to Spring Program sales, was it?

A Yes, it was.

THE COURT: By Spring Program you mean the shipments they made late in December of the year before?

THE WITNESS: Yes.

Q On this subject, did Mr. Rose say anything else as to what the company's rights would be in the event it went out of business?

A Yes. In talking about the finality of the sale --

THE COURT: The company's rights in the event it went out of business?

MR. BICKS: That's right, to collect its receivables.

A Mr. Rose indicated that -- for an example, he said that if it did go out of business we would legally be able to collect all these receivables. He says "However, though, as a policy of good will, we usually have an allowance in here of 5 percent, 7 percent on exchanges of material that some customers might send back,

but in no case would that ever exceed that particular figure."

In addition to this conversation, we did talk about other controls that the company had. Mr. Rose went into a program where he had individual or internal auditors that went out into the field to check to make sure that material was actually moving off the shelves of stores.

Another program that they had in order to coordinate the purchasing and manufacturing process was a perpetual inventory system that would insure good coordination between there manufacturing and make sure that there was sufficient raw materials available to do this.

In addition to that, we -- what was the other control they had? There was another control there he was talking about. Oh, one of the computer programs they had I thought was very interesting was checking their accounts receivable and past accounts receivable and oftentimes they found that a particular customer that was very active one year might not be so active this year and they found that sometimes by notifying the sales people that a simple telephone call would get additional sales and they had a way of tracking each individual customer in order to find this out.

Q Does that exhaust your present recollection as to what occurred during the afternoon of your visit at the facility?

A What happened at least in Rose's office.

Q What happened after you left Rose's office?

A We went downstairs and said goodby to Henry Orenstein, who was at that time conducting a meeting with some other senior people, marketing people, and I thanked him for showing me around the plant and the time he took and at that time David Downs and Mr. Inglis and I went back in Mr. Downs' car.

Q Anything of importance transpire in the course of your auto trip back to New York?

A Well, in the course back to New York Mr. Downs did state that he was instrumental in securing a $7 million long-term credit agreement with Ford Motor and that it did contain certain provisions in there whereby if the company met its projections the agreement could be -- the long-term agreement could become on an unsecured basis.

Q What did you do after you got back to New York?

A After we got back to New York, I asked Mr. Inglis for sometime to put together this material that I had gathered on the trip and he said thathe would be back in touch with me after I had time to assemble that,

assimilate all this material and disseminate it to my superior.

Q Following your return --

THE COURT: Could I interrupt a minute?

MR. BICKS: Yes.

THE COURT: You mentioned the fact that they had suggested that you contact the banks earlier in your testimony. You remember that?

THE WITNESS: Yes.

THE COURT: Did they tell you what individuals to contact or make any suggestion on that line?

THE WITNESS: Yes, they didgive me names of individuals at both banks which I could contact.

THE COURT: Do you remember what name they gave you with respect to the National City?

THE WITNESS: No, I do not. I wrote them down in some notes, but I do not --

THE COURT: They did give you names, but you don't remember offhand?

THE WITNESS: That is correct.

Q Following your return to Hartford did you write a memorandum concerning your August 11th trip to Topper?

A Yes, I did.

Q Is the document in evidence marked Plaintiffs' Exhibit 1417 a copy of that memorandum?

A Yes, it is.

Q Would you look it over, Mr. Hieronymus, see if it brings to mind anything else that transpired in the course of your August 11th trip in addition to those matters about which you have just testified.

A Well, as a result of the trip I did get the impression that the reliability of forecast for the next two years seemed to be very good, an unusual circumstance for this type of company.

Q Where is that subject treated in the memorandum?

A That's in the second paragraph. Should I read it for you?

THE COURT: The paragraph starting "Mr. Henry Orenstein, president"?

THE WITNESS: I am sorry. The third paragraph.

Q Why don't you --

A I beg your pardon?

Q I see it. What were the unusual factors that made the forecast reliable to your judgment?

A Well, for 1971 it seemed that the company had already received the major portion of the orders that it was expecting to receive for that year, so that the

$68 million in sales did not seem unreasonable at all, and this was still early in the ordering season, and in addition, the benefit of Sesame Street products in the following year should greatly improve the prospects of the company.

Q That memorandum, which is marked Plaintiffs' Exhibit 1417, bears the date August 17, 1971. Did anything else occur on August 17, 1971 besides your prepration of that memorandum?

A Yes.

Q In connection with Topper?

A I received a phone call from Mr. Inglis on a number of matters to include some revisions in the proposed terms of the agreement -- I think there was two of them -- also stating that that we were going to be supplied with additional information, information on the break-even analysis of the company and also information as to various examples of the company's reporting system.

Q Did Mr. Inglis tell you who had asked for that?

A I subsequently found out that it was U.S. Steel that had wanted this information.

Q When you say subsequently, do you mean prior to the private placement?

A Prior to the closing of the private --

Q Yes.

A Yes.

Q Go ahead with your description of the conversation with Mr. Inglis on August 17th, if you will.

A Well, in addition, I gave a description of the impact that the 10 percent surcharge on imported goods would have on the company, and summing it up, he said that the deal looked to be firming up and that due to the really good response we are having they are going to increase the issue from $5 million originally set to $7 million, and at that time gave me some names of those individuals that were thinking seriously of participating. Among those were American National, and U.S. Steel had indicated that they were proceeding in the late stages of taking $3 million.

Q Inglis told you this about August 17, 1971?

A Yes, that is correct.

Q You have before you a document in evidence marked Plaintiffs' Exhibit 1419.

Sir, is that a copy of a memorandum on your telephone with Mr. Inglis which you dictated soon after that conversation?

A Yes, it is.

Q Some time following your August 17th telephone conversation with Mr. Inglis, did you receive any further

materials from Topper?

THE COURT: Just for my information, what does the word circle mean in this memorandum?

THE WITNESS: That indicates an intent on the part of an institution to go ahead. The intent is from a business point of view, but it is not legally binding to participate in this deal.

Q Mr. Hieronymus, in the private placement business is circle synonymous with the phrase an indication of interest?

A Yes. There are kinds of circles. Some people want protection, that is an indication of interest, and there are people that like a light circle. It is certainly -- when you say circle it means that it is probably a very strong indication that people are going to be participating in the deal.

Q But in this case, a circle means an indication of positive interest?

A Yes.

Q You have before you a document in evidence marked Plaintiffs' Exhibit 1418, which appears to be a copy of a letter addressed to you from Mr. Rose of Topper with an attachment. Is that a copy of a letter you received soon after the date it bears?

A Yes, it is.

Q Is that the so-called failsafe or minimal operations projection about which you have just testified?

A Yes, it is.

Q I wasn't clear. Was it your testimony that Mr. Inglis told you that this projection or the material reflected in Mr. Rose's letter had been requested by the Pension Fund?

A I subsequently learned this. When he told me about it ~~in~~ in my initial conversation, he did not specify who had requested it. It came out later in the week of August 30th.

Q I call your attention, Mr. Hieronymus, to two documents before you in evidence marked Plaintiffs' Exhibit 1421 and 1422. My question, sir, is are those the memoranda you dictated soon after telephone conversations with two customers of Topper?

A Yes, they are.

Q ~~Could~~ Could you, after looking at those memoranda if you need to refresh your recollection, tell us the best you presently recall as to what you said during the course of those conversations and what each customer to you.

MR. LILLIE: Your Honor, I think we should find out if Mr. Hieronymus has any recollection first.

MR.BICKS: Okay.

Q Don't read your memo.

MR. BICKS: He doesn't want him to read his memo.

MR. LILLIE: I have no objection to that, your Honor.

MR. BICKS: I don't care. I want to get the best he recalls. If reading these memos will help him, let him read them.

THE COURT: I don't see that it makes any difference, but technically he ought to give his unrefreshed recollection first.

What do you remember about your conversation with Mr. Rosenblatt of Korvette?

THE WITNESS: I remember asking him to give me his opinion of Topper's management and what he felt of the toys that they had. The specific wording on here I cannot recall without reading it.

THE COURT: What did he tell you, if anything, it was good, bad or indifferent?

THE WITNESS: I don't recall without looking here.

THE COURT: Now can he read his memorandum?

MR.BICKS: I hope you fellows have had a good time here.

Q Let us start this way: Do you remember why you called Rosenblatt?

A I wanted to find out from a third party as to what the customers thought of Topper management and also their products and thatwas the basic thrust of these two calls.

THE COURT: May I interrupt to ask you a question. All these memoranda indicate an assumption that you probably assume just from working on the case so long. Was there some kind of a downturn in the economy during 1971?

MR. BICKS: That will be the subject of testimony by Mr. Weiss. I don't think there was and I think the evidence will show that Topper's difficulties were primarily the result of Topper's marketing practices.

THE COURT: This memorandum, for example, talks about "Abe indicated that 1971 was not a good year for -- toys."

Q Do you remember, did Mr. Rosenblatt say that 1971 was not a good year for toys?

A Yes, he did.

THE COURT: I thought everybody assumed something I didn't know, but apparently there is no dispute.

Q In any event, you dictated this memorandum soon after your conversation with Rosenblatt and was it meant to be an accurate reflection of the essence of what

Rosenblatt told you?

A Yes, it was.

Q The same [illegible]on with regard to Plaintiffs' Exhibit 1421.

A The same thrust, my questions had the same thrust as the former memo.

Q Do you remember what Bailey of W.T. Grant said about Topper's management?

A Not without reading it here.

Q Go ahead.

A Well, he said he had known Henry Orenstein for years and regarded him as being very creative and a sharp businessman.

THE COURT: There is no point in reading it into the record.

MR. BICKS: No, I am not. That is the essence of it.

Q Do you recall anything else he said other than what is said in that memo?

A No, I do not.

Q Those two telephone conversations were some time between the middle and about the third week in August, were they?

A Yes, they were.

Q Was Mr. Weir away on holiday during this period?

A Yes, he was.

Q Did you do anything further on Topper prior to Mr. Weir's return?

A No, I did not.

Q When did Mr. Weir return to work in 1971?

A On August 30th.

Q What day of the week was that?

A It was a Monday.

Q Tell us what happened with regard to Connecticut Mutual's ~~consideration~~ consideration of Topper in the week beginning August 30, 1971?

A Being that there was some time interval between the last time I had talked with Jay Inglis and we were going along for quite some time here without giving him an answer, I asked Mr. Weir on the morning of August 30th if he had read my trip memo of the August 11th trip.

He said he had not, but he would do so in order to refresh his memory about the situation and we would talk about it in the afternoon.

In the afternoon he did call me back into the office and we sat down for about 20, 25 minutes and talked again about the spread sheets which we were using here, and here again, these are the financial ratios we went

over, and also the products of the company.

In addition, at this time we had a better idea of what the converstion price might be on the convertible issue and we did talk about possible rates of return as they related to the risk that was involved in this situation.

Some of the risks that we were talking about here was the fact that Topper had incurred substantial losses in its recent history of several years ago, the coverages of the fixed charges were low by our standards, the company had a great deal of reliance on bank financing, and the positives that we saw were the Sesame Street line coming on stream, the company seemed to have very good momentum in '71 as far as the new product reception that they had, not only Dawn, but other products.

So that Mr. Weir was not really convinced at this point that it was a deal that Connecticut Mutual wanted to do, but he thought one that was worth presenting to Mr. Bates, who was the president of Connecticut Mutual, to see if he wanted to make this investment.

At that point I proceeded to --

Q Did Mr. Weir ask you to do anything in connection with his projected discussion with Mr. Bates?

A Yes. He asked me to proceed in making up what we call on the first page an industrial summary sheet,

from which he could talk with Mr. Bates about all the information that we had gathered in making his decision as to whether or not we should go ahead with this investment.

Q Mr. Hieronymus, you have before you a document in evidence marked Plaintiffs' Exhibit 1423. Is that the copy of the ~~industry~~ industrial summary sheet and material about which you have just testified which Mr. Weir asked you to prepare in the afternoon of Monday, August 30th?

A Yes, it is.

Q About how many days did it take you to prepare it?

A Approximately three days.

Q So that even though it is dated August 30th, you in fact worked on it the 30th, 31st, the 1st of September?

A That is correct.

Q While you were working on the industrial summary sheet, which is Plaintiffs' Exhibit 1423, what, if anything else, happened in connection with Topper?

A During the week I received several phone calls from Mr. Inglis, the exact timing of which I cannot pinpoint during the week, which I basically related verbally to Mr. Weir. One of these conversations had to do with why we were taking so long to make up our minds on Topper and that Mr. Inglis had worked with Mr. Weir on another deal called

Red Carpet in ~~which~~ which we did take a piece of that particular financing and he thought that Topper had a lot more going for it in the new products, the management group, and especially with the Sesame Street line coming on, adding stability.

I told him at that time that I wasn't familiar with Red Carpet and this particular financing had to stand on its own.

Also some time during the week he called me to tell me that the participants in the deal were firming up, U.S. Steel would definitely be going ahead here with $3 million, Princeton University Endowment Fund was going to participate for $1 million, and this was based upon the enthusiasm that Harvey ~~Jole~~ Mole had for this particular deal.

Mr. Inglis also indicated that Harvey Mole was directly involved with the negotiations and had become very optimistic about its outcome.

THE COURT: Is Harvey Mole a Princeton man?

THE WITNESS: I don't know if he is or not.

MR. BICKS: Mr. Mole, from whom you will be hearing Monday morning, is chairman of the Princeton Trustees Finance Committee.

THE COURT: He was the officer --

MR. BICKS: President of the Pension Fund.

Excuse my testifying, sir. You will hear that directly from Mr. Mole on Monday.

THE COURT: Yes.

Q Go ahead. What else did Mr. Inglis say?

A Well, in addition, U.S. Steel had talked again with the company and Mr. Inglis asked maybe, if Connecticut Mutual had some additional questions, why don't we come down and also visit with the company again to clear up the particular questions.

In addition, I raised the question of whether or not the banks were willing to go unsecured in this situation, as I had mentioned before, and he had not answered my question as to whether or not they would, and Mr. Inglis said that he had indeed checked in with the company on this and found that the banks were not at this point willing to go unsecured until some time after the year-end figures were available.

I pressed my argument on this particular situation and feeling that the banks were in here in a substantial way and that we should have some indication from them that they would go unsecured before we put our money in.

Mr. Inglis then said that,as I had heard before, that the banks had been with the company for a long time,

had been through a lot of trials with the company, they knew the management well, and they felt comfortable with them.

In addition to that, he said that Henry Thompson of U.S. Steel had indeed checked with First National City Bank and had obtained a favorable check on the management of the bank and also as to the present financial condition of the company.

Q You said management of the bank. Did you mean management of Topper?

A Management of Topper. Excuse me.

MR. LILLIE: Excuse me, your Honor. I don't mean to interrupt again, but is the witness reading from some exhibit in answering these questions?

THE COURT: Are you reading from anything?

THE WITNESS: No, I am not.

MR. LILLIE: Okay. I am sorry.

Q When was the next time you discussed Topper with Mr. Weir? You said you talked to him on Monday and then you testified to several conversations with Mr. Inglis.

A During the week I was filling Mr. Weir in as to the various events that had been taking place through Mr. Inglis' calls and updating him as to where the deal stood and he was taking this in with interest.

On Wednesday afternoon, after my memo was done, the memo which is the industrial summary ~~sheet~~ sheet memo --

THE COURT: Exhibit 1423?

THE WITNESS: Yes.

A --he asked me for some clarifications on it and just a general feeling for anything that he had questions on before he went to see Mr. Bates.

Q Mr. Bates again was the president of Connecticut Mutual?

A Yes.

Q Did there come a time soon after that when, to your knowledge, Mr. Weir went to see Mr. Bates?

A Yes. Mr. Weir saw Mr. Bates on Thursday, early Thursday afternoon, to get his opinion of this particular financing. I was not present at that meeting, so I do not directly know what took place.

I do know that upon Mr. Weir's coming downstairs that he did call me immediately into his office and said that the decision to go or not to go on this deal has essentially been left up to me --

THE COURT: You mean to Mr. Weir, not to you?

THE WITNESS: That is correct, to Mr. Weir.

A -- and we again started kicking around some of the pros and cons of this particular investment.

Mr. Weir did say certainly the Sesame Street contract was a very good one to have, although he was concerned with the degree of leverage and also the position of the banks in this particular case, mentioning at one point the interest rate.

I at that time told him about the information I had received from Mr. Inglis as to the banks living with Topper through a number of trials and tribulations and also the fact that Henry Thompson had checked with the banks and he had satisfied himself that the bank's management and financial condition was very satisfactory.

THE COURT: You had met Henry Thompson by this time?

THE WITNESS: No, I had not.

Q Mr. Hieronymus, did you say the bank's management or Topper's management?

A Topper's management. I am sorry.

Q What did Mr. Weir say when you imparted that information to him?

A Well, he seemed satisfied that we would go ahead here and recommend taking a million dollars of this particular investment.

Q What did he suggest ~~me~~ you do?

A He asked me to prepare an executive committee memorandum dated September 2nd, I think.

Q Do you have before you a document now that is marked Plaintiffs' Exhibit 1425? I ask you if you will take a look at it and tell us if that is the copy of the executive committee memorandum which you prepared that late Thursday afternoon following your meeting with Mr. Weir?

A Yes, it is.

Q Did the executive committee of Connecticut Mutual meet, in fact, to consider the proposed investment the next day, on Friday?

A Yes, they did.

Q Were you present during the course of that consideration?

A Yes, I was.

Q Do you recall what questions were asked you?

A I do not recall any questions that were asked. I did participate to the extent of describing what the deal was about, a small description of what the company did, and our possible return on this particular investment.

Q Did the executive committee authorize management to proceed to negotiate the Private Placement if it so chose?

A Yes, it did.

Q And that was on Friday, September 2nd?

A 3rd.

Q 3rd? I apologize.

Following the executive committee authorization on Friday, September 3rd, did there come a time soon thereafter when you learned that one or two of those who Mr. Inglis indicated would be participating in the Private Placement would not be participating?

A Yes.

Q Tell us the circumstances in which you learned that.

A The following week Mr. Inglis did call and said that American National and the Princeton Fund would not be investing in this private placement.

In the case of American National he said someone there had overstepped their bounds of authority, and when it reached higher levels he was turned down. In the case of the Princeton Fund, there was a misunderstanding between Mr. Mole and a person actually running the fund, and that individual did not want to participate. So the deal was cut back to $5,250,000.

I asked Mr. Inglis to relay this ~~particular~~ particular information to Mr. Weir, and he did so immediately. At that point Mr. Weir after talking with Mr. Inglis called me into his office, asked me whether or not the United States Steel Pension Fund was going to participate, and I thereupon called Henry Thompson of the United States Steel Pension Fund to find out if, indeed, they were going to participate.

Q When did you make that call? About what date?

A That was some time the following week. I don't really recall what day that might have been.

Q What did Thompson tell you?

A Thompson said that, yes, they were going ahead and had satisfied themselves on the credit of the company. Then he asked me if we were continuing to go ahead, and I said, yes, we were.

Q Did Connecticut Mutual, in fact, participate in the Private Placement?

A Yes, we did.

MR. BICKS: That is all, your Honor.

THE COURT: Are you ready to proceed, or would you like a few minutes?

MR. LILLIE: I would like a few minutes.

(Recess.)

MR. LILLIE: Your Honor, we have a few exhibits to put in, in addition to the ones the plaintiffs have put in. I will read them into the record with your permission, with a short description of each.

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CROSS EXAMINATION

BY MR. LILLIE:

Q Mr. Hieronymus, when Mr. Bicks was questioning you, do you recall testifying about your prior employment?

A Yes, I do.

Q Did you have employment prior to joining Connecticut Mutual?

A Yes, I did.

Q Will you describe what that employment was?

A I was a security analyst for Mutual of New York at 140 Broadway, New York, New York.

Q For how long?

A Approximately five years.

Q Do you recall testifying about your receipt of the June 30, 1971 financials?

A Yes.

Q Do you recall focusing on the fact that those financials showed Topper's accounts receivable year-to-date in the approximate amount of $28 million?

A I did, in fact, know that there were $28 million.

Q Do you recall also focusing on the fact that sales to date were $19 million?

A Yes.

Q Do you recall testifying earlier in response to Mr. Bicks' questions that you asked somebody at Topper how the Spring sales were doing?

A Yes, I did.

Q And they told you that virtually all those sales had been paid for?

A That is correct.

Q When you were told that, did you focus upon the fact that as of June 30, 1971, there were approximately $9 million of accounts receivable outstanding?

A I don't think I viewed it in those terms.

MR.BICKS: I think Mr. Lillie is confused. He just elicited from the witness the fact that there were $29 million.

MR. LILLIE: Before the amount of sales year-to-date, I meant.

THE WITNESS: I don't believe I did the actual calculations, but as of June 30th there was still another month to go, and I did not know the exact timing of the collection of receivables, so in another month the receivables could actually have been collected.

Q You didn't ask whether that amount, in fact, had been collected in this period of time?

A No, I did not.

Q Did you ever review the loan agreement between First National City Bank and Topper?

A No, I did not.

Q Did you know that the lending banks through Citibank were advancing to Topper on an accounts receivable basis?

A On an accounts receivable and also inventory, wasn't it?

Q Didn't you understand that under the loan agreement advances to Topper were made on the basis of accounts receivable prior to the Private Placement?

A I knew from an indication in the footnotes of the Private Placement Memorandum that the Financing Agreement would allow a certain amount of loans to receivables.

Q I didn't hear the last part of that statement.

A I was aware of the fact that the banks would loan up to 80 percent of the receivables, as indicated in the footnotes to the financial statements.

Q Which footnote are you referring to? Are you referring to the Prospectus or to the June 30, 1971, financials?

A I believe the Prospectus.

Q I believe you have a copy of Exhibit 462 before you up there.

A Is this it?

Q Yes, it is attached to that.

THE COURT: Do you have the page?

MR. LILLIE: What page is it?

MR. BICKS: Page 5 in the Prospectus.

Q Do you see any reference in that footnote on page 5 in the Prospectus to the rate of advance against receivables?

A What note? No, I do not.

Q Actually, I believe, Mr. Hieronymus, if you go to page 12 of the Prospectus, the first paragraph under the Financing Agreement.

A Right.

Q Do you recall whether you focused on that part of the Private Placement?

A Yes, I did.

Q Do you recall having any knowledge about what information was being supplied to First National City Bank under the Financing Agreement?

A No, I do not.

Q Did you ever ask what information was being

supplied to First National City Bank under the Finance Agreement?

A Not that I can recall.

Q Do you recall becoming aware at the time you received the June 30, 1971, financials that the sales year-to-date were approximately $19 million? I just asked you about that a few minutes ago.

A Yes.

Q Do you recall that the projected sales for 1971 were $68 million?

A Yes.

Q Do you recall discussing your receipt of the Examples of Company Reporting?

A Yes.

Q Do you also recall your discussion with Mr. Rose at Topper concerning the prior bill and hold situation at Topper in the late '60s?

A Yes.

MR. BICKS: Pardon me. I don't think he testified it was the late '60s.

THE WITNESS: The bill and hold policy that I testified to was with Orenstein.

Q Yes.

And do you recall when Mr. Orenstein told you

that bill and hold had been in effect?

A In the period from 1966 and before that.

THE COURT: Before he bought it back?

THE WITNESS: That is correct.

Q I show you a copy of what has already been marked as Plaintiffs' Exhibit 1459 and I ask you if you recall seeing this page? This is the Examples of Company's Reporting?

A I recall leafing through the booklet and looking at the examples. I don't recall this particular page has any particular item, other than the other ones, either.

MR. LILLIE: For your Honor's convenience, because these pages are not numbered, I will just read part of the left-hand column of that page.

It says Account Globe Warehouse Company, Inc. Further on down there are three references to the words "bill and hold."

Q Do you recall seeing bill and hold on this page of the Examples of Company's Reporting, Mr. Hieronymus?

A No.

Q Do you recall seeing any pages on the Examples of Company's Reporting that showed various amounts of merchandise being returned to Topper?

A I believe there was an exhibit in that, yes.

Q Do you recall a reference to Blatt Distributing in La Mirada, California indicating that 189,360 pieces were the subject of a return credit?

MR.BICKS: Will you identify the page you are apparently referring to in the exhibit?

MR. LILLIE: I am asking the witness if he recalls. If he does not, I will be glad to show him the document.

A I don't recall, focusing on that particular one.

Q There is a page number on that page, and that is page 36.

I draw your attention to that entry, Mr. Hieronymus. Do you recall that? Do you recall seeing that at the time?

A I don't recall focusing on any of these particular numbers in these exhibits because they were given to us as examples, and it is very hard to draw any conclusion from a single page example as to what transactions are going on.

Q Do you recall reading the following language in the Examples of Company's Reporting:

"For the past three years, the company's accounts receivables have been maintained on the computer with the result that aging of accounts receivable can be prepared quickly after the end of the month, both in summary form by account and in detail for follow-up on collection of open invoices and deductions. In addition, the projection of cash receipts is prepared monthly by the computer indicating anticipated receipts by week."

Do you recall seeing that language?

A I recall that Mr. Rose did mention a particular program like that. That particular example does bring to mind that particular conversation.

Q Did you ask to see any of those reports?

A No, I did not.

Q You talked about your conversations earlier, Mr. Hieronymus, with two gentlemen who were customers of Topper. Do you recall that?

A Yes, I do.

Q Do you recall asking either of those customers whether Topper was doing any bill and hold for 1971?

A No, I do not.

Q Do you recall asking either of those customers

of Topper whether Topper had any provision with them for the return of goods?

A No, I did not.

Q For the exchange of goods?

A No, I did not. Having already questioned the management of the company and saying that they no longer had any of these type of particular policies, I found it not very productive to go ahead and go after things that already had been satisfied in the past and the thrust of my questioning was not in that direction.

Q But you were very concerned at one point during your investigation about the possibility of continuing bill and hold arrangements, were you not?

MR. BICKS: I don't believe he testified to that effect. He testified --

THE COURT: I don't recollect. Put the question in the affirmative.

Q Were you not concerned at one time, Mr. Hieronymus, about the possibility of continuing bill and hold arrangements?

A Yes, I was.

Q Were you not so concerned at the time when you talked to these people from the customers of Topper?

A At the time I talked with the customers of Topper,

I had already been assured by Henry Orenstein that this particular policy had no longer been carried on by the company and that he would not enter into that policy again because of the serious consequences it got him into last time.

Q You recall Mr. Bailey from W.T. Grant, one of the customers to whom you said you spoke, telling you that due to the tough nature of the toy industry a hot item one year, like Dawn doll, might not sell at all well the next year?

A Yes, I do.

Q You talked earlier also about the fact that you became aware on or around September 2nd, September 3rd, that Princeton and American National were not going to take part in the private placement, is that correct?

A No, it is not.

Q When did you become aware of that?

A It was some time after that, in the following week.

Q When you became aware of that did you ask anybody why they had dropped out?

THE COURT: You mean anybody in those two companies?

MR. LILLIE: Anybody anywhere.

THE COURT: He asked --

A Mr. Inglis gave me an explanation as to why, --

Q What was that explanation again?

A The explanation was that in the case of American National the fellow who had circled had overstepped his bounds, and upon having it reviewed at a higher level he was overruled.

Q With regard to that, was there any explanation or did you ask -- withdrawn.

A I beg your pardon?

THE COURT: He has withdraw his question.

THE WITNESS: Oh.

Q Did you ask anybody why this person had been overruled?

A Other than Mr. Inglis.

Q Did you ask anybody --

THE COURT: Did you ask Mr. Inglis, in the first place, why he had been overruled?

THE WITNESS: No, I did not, although it is customary in the industry to have various investments that people circle up at one point or another and once they either get to the finance committee or investment committee for some reason or other have them drop out. It is very common in the industry.

Q As you say, there is normally a reason why that

takes place, correct?

MR. BICKS: I don't believe he said that.

THE COURT: He didn't say that. He is now being asked.

Q There is normally a reason why that happens, is there not?

A Yes, there is.

Q You did not in this case ask what that reason was?

A The reason given was that this fellow over-stepped his authority in circling it up and upon getting to higher levels it didn't meet with those --

THE COURT: He wants to know did you try to find out why the upper people didn't like it.

A No, I did not.

Q Would you explain once again what reason you were given, if any, for the dropping out by the Princeton Endowment Fund?

A Other than what I have already testified to?

THE COURT: He wants you to repeat what you have said on that subject.

THE WITNESS: Oh.

A That Harvey Mole, who was one of the trustees of the fund, had been very enthusiastic on this particular

financing and wanted to include it with the Princeton Fund, and upon having it brought up to the person who was operating it on a daily basis, it was decided that this was not the particular investment that they wanted to make.

Q Did you ask why they decided that?

A No, I did not.

Q I ask you to look at a copy of what has been entered as Hayden Stone Hieronymus A.

THE COURT: That is the April 13, 1971 memo?

MR. LILLIE: That is a September 16, 1971 memo from White & Case, your Honor. It was in the group that I handed up to you prior to the cross examination. Those are loose, held together with a paper clip.

THE COURT: All right, I have it.

Q Do you have that in front of you, Mr. Hieronymus?

A Yes, I do.

Q Is that a copy of a letter which you received from White & Case?

A Yes, it is.

Q Were you aware prior to that time that attorneys from White & Case were representing both Topper and the participants in the Private Placement?

A Yes, I was.

Q When did you first become aware of that?

A Mr. Thompson phoned me to ask me if they could have White & Case represent them in that White & Case had worked for some time with them and they were very familiar with this particular firm and would like to have them as the special counsel.

Q Would you take out what has been marked as Citibank Exhibit 15, Mr. Hieronymus. That's in that same pile. That's a copy of your chronology dated January 21, 1972.

Is that in fact a copy of the document you wrote on or about January 21, 1972?

A Yes, it is.

MR. BICKS: May I have a copy of that document if you are going to question the witness on it? I don't have one.

Q Your answer was yes to that, was it not?

A Yes, it was.

Q The third item on that chronology is dated July 31, 1971. Do you see that item?

A Yes, I do.

Q Is Citibank Exhibit 158 the numeral to which that item refers?

A Yes.

Q That is the numeral?

A Yes, I believe so.

Q Who asked you to write CBX 15, if anyone?

A Mr. Hook, Mr. Keith Hook.

Q Would you read --

THE COURT: Who is Mr. Hook?

THE WITNESS: Mr. Keith Hook, he is in-house counsel for Connecticut Mutual.

Q Would you please read the introduction to the chronology into the record, please.

A "The following is a chronology of events of facts that led up to the investment on" --

Q "to our investment," right?

A I am sorry. -- "our investment on September 28, 1971 in Topper Corporation."

MR. LILLIE: I have no further questions.

THE COURT: Mr. Bicks.

REDIRECT EXAMINATION

BY MR. BICKS:

Q With regard to this document you have just been shown, that I have belatedly seen, would you look it over, Mr. Hieronymus, and I ask with the exception of Item 2 if there is anything on there that isn't reflected by a document in your file.

THE COURT: Isn't reflected by a document --

MR. BICKS: In your file.

THE COURT: I see.

A No, there is not.

MR.BICKS: No further questions.

THE COURT: I guess that's all. Thank you.

(Witness excused.)

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

UNITED STATES STEEL AND CARNEGIE PENSION FUND, INC., CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, et al.,

Plaintiffs-Appellants,

-against-

HENRY ORENSTEIN, FIRST NATIONAL CITY BANK, HAYDEN STONE INC., et al.,

Defendants,

-and-

FIRST NATIONAL CITY BANK,

Defendant-Appellee

AFFIDAVIT OF SERVICE ON PERSON IN CHARGE

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MORRIS ARNSTEIN being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, N.Y. 10005, attorneys for the Plaintiffs-Appellants in the above action.

On the 28th day of January, 1977, I served the annexed JOINT APPENDIX ON APPEAL - VOLS. I - V

on the attorney(s) listed below by delivering the same to and leaving the same with the person in charge of said office(s).

Shearman & Sterling, Esqs., Attorneys for Defendant-Appellee
53 Wall Street, New York, New York 10005

Sworn to before me this
28th day of January, 1977

Edna G. Watrous
NOTARY PUBLIC
EDNA G. WATROUS
No. 24-4543[illegible]
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Morris Arnstein